

FALLING OVER BACKWARDS

against
An essay ~~on~~ Reservations
against
and ~~on~~ Judicial populism

Ann Shouse

How is it that what was explicitly forbidden by the Constitution – classification based on caste – has become the rule? How is it that what were *enabling* provisions have become *mandatory minima*? Where does the figure 50 per cent come from? How is it that in practice it is exceeded blatantly? Are the benefits not being hogged by a few, the better-off among these castes? Has the “creamy layer” been actually hived off? How is it that what were begun as reservations at entry became reservations in promotions also? How did this become a right to *accelerated* promotions? How did *that* become a right “accelerated promotions with consequential seniority”? How did that become a right to have the prescribed standards diluted – to the point of being waived altogether? Even in educational institutions. Is this any way to become a “knowledge super-power”?

As there has been no caste-wise enumeration and tabulation since the 1931 Census, where does this mythical figure – “OBCs are 52 per cent of the population” come from? And what did the 1931 Census itself say about its caste-wise figures?

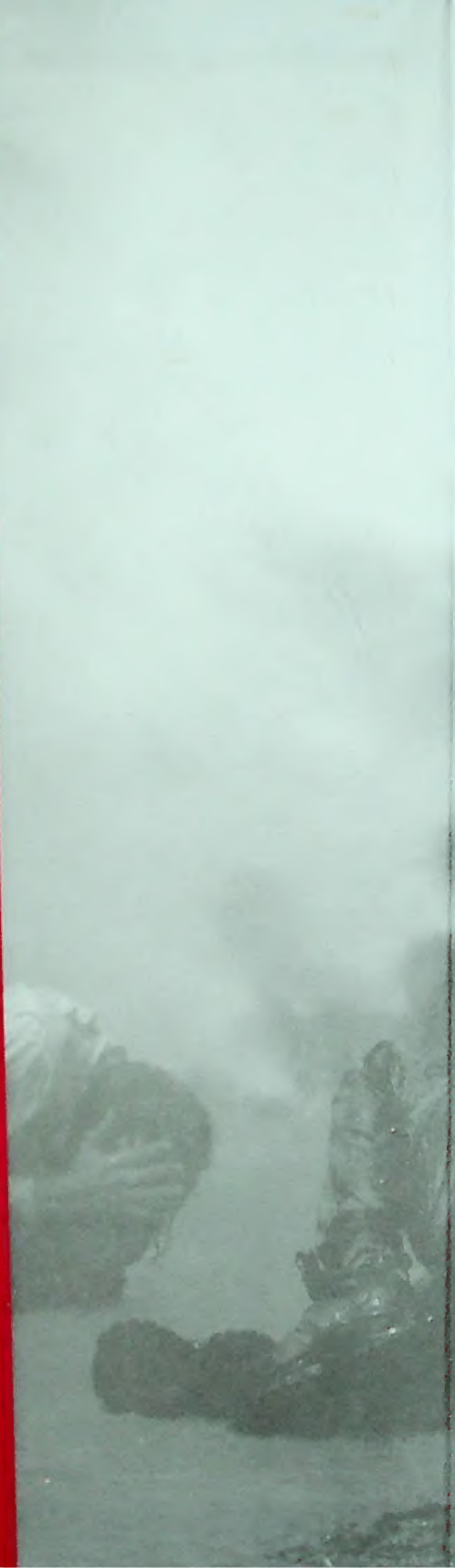
The race then was to get one's group recognized as a *higher* caste. How has it become a race to get it anointed as “backward”? Are the “backward castes”, the weak ones who need protection and special privileges? Are they not the dominant, and domineering castes? Who is most responsible for atrocities on *harijans*?

How have the Courts come to acquiesce in such wholesale perversion of the Constitution? Is their role to cheer such perversion on? Or is it to *conserve*, to protect the Constitution?

Where will this process end? Has it not already enfeebled the State structure? Has it not already riven our society? Has it not subverted parliamentary democracy? Has Pandit Nehru's warning not come true – that “This way lies not only folly, but disaster”?

With trenchant evidence from the Archives of the 1930s and '40s, from Censuses, from judgments of the Supreme Court, with telling facts about the situation that has already come to prevail on the ground, ARUN SHOURIE nails the perversion of the Constitution, and urges a complete reversal. The weaker sections must be helped, but by altogether different methods.

A must for our times. A must for strengthening our country.





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Falling Over Backwards

An essay on *Reservations* and on *Judicial populism*

ARUN SHOURIE

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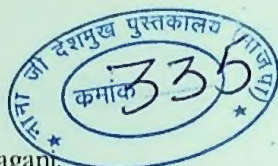
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*In memory of
my mother and father*

*Zindagi ke har ik mod pe nazar aayaa
Teri nigaah-e-karam kaa ghanaa ghanaa saayaa...*
— Firaq

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"This way lies
not only folly, but disaster"

I have referred above to efficiency and to our getting out of our traditional ruts. This necessitates our getting out of the old habit of reservations and particular privileges being given to this caste or that group. The recent meeting we held here, at which the Chief Ministers were present, to consider national integration, laid down that help should be given on economic considerations and not on caste. It is true that we are tied up with certain rules and conventions about helping the scheduled castes and tribes. They deserve help but, even so I dislike any kind of reservation, more particularly in Services. I react strongly against anything which leads to inefficiency and second-rate standards. I want my country to be a first class country in everything. The moment we encourage the second-rate, we are lost.

The only real way to help a backward group is to give opportunities of good education, this includes technical education which is becoming more and more important.

Everything else is provision of some kind of crutches which do not add to the strength or health of the body. We have made recently two decisions which are very important: one is, universal free elementary education, that is the base; and the second is scholarships on a very wide scale at every grade of education to the bright boys and girls, and this applies not merely to literary education, but, much more so, to technical, scientific and medical training. I lay stress on the bright and able boys and girls because it is only they who will raise our standards. I have no doubt that there is a vast reservoir of potential talent in this country if only we can give it opportunity.

But if we go in for reservations on communal and caste basis, we swamp the bright and able people and remain second-rate or third-rate. I am grieved to learn how far this business of reservations has gone based on communal considerations. It has amazed me to learn that even promotions are based sometimes on communal or caste considerations. This way lies not only folly, but disaster. Let us help the backward groups by all means, but never at the cost of efficiency. How are we going to build the public sector or indeed any sector with second-rate people?

What this essay is about

"Merit and efficiency is [sic.] a pure Aryan invention, aimed at maintaining their monopoly," the Supreme Court judgment quotes, with manifest approbation, from the typical write-up of a propagandist. The title of the write-up is, "Merit, my foot. A reply to Anti-Reservation Racists." "Nowhere in the world," the Supreme Court says on the authority of this person, are "merit and efficiency" given so much importance as in India which is now pushed to the 120th position – virtually the last among different countries in the world." "Upper caste rulers of India," it continues on the same person's authority, "keep the country's vast original inhabitants – Untouchables, Tribals, Backward Castes and 'religious minorities' – permanently as slaves with the help of this 'merit' *mantra*. By 'merit and efficiency' they mean the birth. Merit goes with the highborn – the blue blood. This is pure and simple racism. That birth and skin-colour have nothing to do with 'merit and efficiency' (brain) is a scientifically proved fact. But the ruling class nowhere in the world is concerned with science because science stands for progress. And those interested in progress will have to be human. That is not so in India. If one has to see man's inhumanity to man in its most naked form he must come to India, the original home of racism and inequality. So, the merit theory beautifully suits its ruling class or caste...."¹

The author of the publication² which the Supreme Court cites to buttress its judgment is a rabid propagandist. He is given to hurling the vilest abuse. For years and years he and his venomous rag of a journal have lauded the British rulers and British rule; they have hailed those who helped conquer India for the British; they have

¹Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC 201, at 231, para 35.

²V.T. Rajshekhhar, *Merit, my foot. A reply to Anti-Reservation Racists*, Dalit Sahitya Academy, Bangalore, 1996.

advocated violence. And here we have the Supreme Court of India relying on the rant to fortify its judgment!

But why look at what the Supreme Court *cites*? Why not look at what it says on its own? "Efficiency is very much on the lips of the privileged whenever reservation is mentioned," it declares in a judgment that we shall examine in a moment. "Efficiency, it seems, will be impaired if the total reservation exceeds 50%; efficiency, it seems, will suffer if the 'carry forward' Rule is adopted; efficiency, it seems, will be injured if the Rule of reservation is extended to promotional posts. From the protests against reservation exceeding 50% or extending to promotional posts and against the carry forward Rule, one would think that the civil service is a Heavenly Paradise into which the archangels, the chosen of the elite, the very best may enter and may be allowed to go higher up the ladder." "But the truth is otherwise," it continues. "The truth is that the civil service is no paradise and the upper echelons belonging to the chosen classes" are "not necessarily models of efficiency." "The underlying assumption," the Court asserts, "that those belonging to the upper castes and classes, who are appointed to the non-reserved posts will, because of their presumed merit, 'naturally' perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes." "And what is merit?," it demands. And answers: "There is no merit in a system which brings about such consequences..." "Always one hears the word 'efficiency' as if it is sacrosanct and the sanctorum has to be fiercely guarded...", it declares. "Efficiency is not a *mantra* which is whispered by the *Guru* in the *shibhsya*'s ear," it scoffs. "The days of Dronacharya and Ekalavye are over....," it warns.¹

This essay is about how we have got from Panditji's, "This way lies not only folly, but disaster," to pronouncements of this kind.

The basic explanation, of course, is the direction that politics has taken. As politicians and political parties have been less and less able

¹K.C. Vasanth Kumar v. State of Karnataka, 1985, Supp. SCC 714 at 737-40, paras 33, 36. I am just citing a few representative lines from the judgment here, and shall take it up for examination later.

to commend themselves on the basis of their performance, they have deployed a standard technique: look for a grievance, for some measure by which it can be shown that the target group has been left behind; when you can't find the grievance, invent it; stoke the sense of being discriminated against; frighten the group into believing that others are out to take away even more of what is *its* right; and present yourself as the only available saviour. Inevitably, in each succeeding round, two things have happened. On the one side, the grievances that have been stoked have been more and more far-fetched. On the other, the group at which the rhetoric has been directed has been narrower and narrower.

In the end, politicians pass laws. They appoint judges as much as Vice-chancellors and IGs of police. Hence, the ultimate responsibility lies with them. But they have received much help from others – the “progressives” who have dominated public discourse, for instance; a handful of “progressive” judges, for another. This essay is primarily about these aiders and abettors – for at least some of them, the word should really be “instigators”. In a word, it is about the turn that discourse has taken in the last thirty years, and the price that the country has to pay for it today.

Both the perversity and the costs could have been illustrated by the rhetoric of political leaders, the harangues of the large number who have lunged for casteist politics. But their declarations are so vapid that it is almost an insult to devote a book to them.

Both the perversity and the costs could just as easily have been illustrated by examples from the writings of many of our “progressive” commentators. But there are three drawbacks to citing them. Their writings are the staple of our journals and newspapers. The book would, therefore, become ten times more voluminous. Moreover, as they have hogged public space for thirty years, the reader can himself garner the examples with ease. And then there is always the problem: we have but to cite one of them, and so many are apt to question his significance, and of his pronouncements.

I have, therefore, chosen to illustrate the descent, and to depict the consequences, with judgments of our Supreme Court.

That, of course, eliminates one problem: no one can turn back and say of the judges, “But who are they?” But it leaves another. The judgments are prolix and repetitive in the extreme. The “progressive”

judges no less than their counterparts in the popular media just keep repeating a standard set of assertions. They just keep invoking each other. Hence, on occasion, as the reader comes to a passage, he might feel, "Hasn't that been set out in the book already?"

But for at least four reasons, I would hope that he will still wade through each successive passage. One, given what the judges do, that sort of repetition – they would use the word, "reiteration" – is inevitable. Two, in fact the succeeding judges do not just reproduce what the earlier "progressives" have said. They build on it. In a sense, each feels *compelled* to build on the radical magniloquence of the one he is invoking. He feels *compelled* to invent yet another "reason", to paste an even viler motive... He adds a phrase, he loosens a condition, sometimes he adds just one word – most often we would not even notice the addition, yet each addition lowers standards another notch. Third, on occasion the passage illustrates different facets of the "reasoning" on which the progressives build their assertions: to see its full import, we must reflect on the passage in different contexts. Most important, we must know those whom we must obey: as judges are among them, we must read what they have to say – as much as possible in their own words.

I would hope, therefore, that the reader will persevere and examine successive passages. Nor is it just that each successive passage marks yet another stage in the descent. It has an operational consequence: it propels the country even faster from the folly that Panditji asked us to heed to the disaster that he asked us to beware.¹

¹Unless indicated otherwise, words have been italicized by me.

Constitutional provisions: what they were,
what has been made of them

Blowing up every dyke

How far we have descended! Today progressives dress up their casteism as secularism! The benefits of reservation shall be extended to Muslims and Christians also, they proudly announce. In Andhra the decision of the Government has had to be twice struck down by the courts – the Government had decreed reservations for Muslims *qua* Muslims. Even as moves are afoot to get that judgment reversed, the Central Government directed the Armed Forces to count soldiers and officers by their religion. Nor was the move an inadvertence. It arose as a result of a committee that the Government has appointed under a former Chief Justice of the Delhi High Court. Each member of the Committee has been carefully selected for his “secular” and “progressive” beliefs. Each term of reference on which the Committee has been asked to supply information and make recommendations has been just as carefully selected to justify reservations and other concessions to Muslims as a religious group:

- ❑ “What is their relative share in public and private sector employment?... Is their share in employment in proportion to their population in various states?...”
- ❑ “What is the proportion of Other Backward Classes (OBCs) from the Muslim community in the total OBCs population in various states? Are the Muslim OBCs listed in the comprehensive list of OBCs prepared by the National and State Backward Classes Commissions and adopted by the Central and state Governments for reservations for various purposes? What is the share of Muslim OBCs in the total public sector employment for OBCs in the Centre and in various states in various years?...”

Every single item betrays the singular purpose of the whole exercise – to provide the rationale for extending reservations to Muslims. Nor is that opportunism confined to the present ruling coalition. In the run-

up to the 2005 elections in Bihar, rival groups were vying with each other promising reservations for Muslims *qua* Muslims.

The object of the framers of the Constitution was, as ours must be, quite the opposite. It was to wipe out the cancer of caste even from Hindu society. Only with the greatest reluctance did they agree to allow reservations for the Scheduled Castes and Tribes – for they felt that doing even this much would perpetuate caste distinctions.

The reservations were, therefore, to be exceptions to the general rule.

Moreover, the provisions by which these were allowed were crafted carefully to be just *enabling* provisions. They were worded to confer no more than a discretionary power on the State. They did not cast a duty on the State to the effect that it must set apart such and thus proportion of seats in educational institutions or of posts in government services on the basis of birth. The provisions were written so as to obviate a challenge to the steps that the State may take to raise the downtrodden. They were not to confer a right on any one.

And the whole scheme was to be a temporary affair, a scheme made necessary by the circumstances of the moment.

Proposals were advanced during the deliberations of the Constituent Assembly that there be reservations for Muslims, etc. also. After reflection, the representatives of these communities themselves decided that such reservations on communal lines would be harmful to the country, and to the communities themselves.

Accordingly, when reservations in government jobs for Scheduled Castes were discussed, no one demanded that these be extended to non-Hindus in general. Two Sikh members, however, said that these should be applicable to the Sikhs also. “And so when these proposals were brought to us,” Sardar Patel informed the Constituent Assembly, “I urged upon them (the Sikh members) strongly not to lower their religion to such a pitch as to really fall to such a level where for a mess of pottage you really give up the substance of religion.”

“But they did not agree,” he lamented. “These people have now agreed to be lumped into the Scheduled Castes; not a very good thing for the Sikh community, but yet they want it...”

The Scheduled Caste representatives protested vehemently against this inclusion.

The Sardar, therefore, sought to justify the expedient – the traumatic hardships the Sikhs have suffered because of the Partition, the fact that on the testimony of these leaders of the community, in spite of the fundamental tenets of their religion, castes still abound among them... As a special case, therefore, allow this singular exception....

So extreme was the reluctance. And it was all to be temporary: "Now our object is, or the object of this House should be," the Sardar declared, "as soon as possible and as rapidly as possible to drop these classifications and differences and bring all to a level of equality." And so he appealed to all sections – majority and minority, high caste and low caste – to work for their obliteration.

And that approach remained the beacon.

"It is a motion which means not only discarding something that was evil," Panditji said, "but turning back upon it and determining with all our strength that we shall pursue a path which we consider fundamentally good for every part of the nation." He had risen in the Constituent Assembly to second a motion that Sardar Patel had moved to abolish separate electorates. "Reluctantly we agreed to carry on with some measure of reservation," he said – in part to leave their abolition to the minorities, and in part to make sure that everyone would respect the rights of those affected. "We agreed to that reservation," he said, "but always there was this doubt within our minds, namely, whether we had not shown weakness in dealing with a thing that was wrong. So, when this matter came up in another context, and it was proposed that we do away with all reservations except in the case of the Scheduled Castes, for my part I accepted that with alacrity and with a feeling of great relief, because I had been fighting in my own mind and heart against this business of keeping up some measure of separatism in our political domain; and the more I thought of it the more I felt that it was the right thing to do not only from the point of view of pure nationalism, which it is, but also from the separate and individual viewpoint of each group, if you like, majority or minority." There is some point in having a safeguard of this kind where there is autocratic rule or foreign rule, he explained. But in a full-blooded democracy, such devices in fact end up harming the section they are intended to benefit – the section gets isolated from

the general populace; the natural empathy that the society as a whole should have for that section gets eroded.

"Frankly," he told the Assembly, "I would like this proposal to go further and put an end to such reservations as there still remain. But again, speaking frankly, I realize that in the present state of affairs in India that would not be a desirable thing to do, that is to say, in regard to the Scheduled Castes." He consoled himself and the Assembly by drawing attention to two attenuating circumstances. He told the delegates, "I try to look upon the problem not in the sense of a religious minority, but rather in the sense of helping backward groups in the country. I do not look at it from the religious point of view or from the caste point of view, but from the point of view that a backward group ought to be helped, and I am glad that this reservation will be limited to ten years...."¹

In the letter he wrote to the Chief Ministers a few days later, he reverted to this matter, one, as he wrote, "having a certain historic significance." "I am happy that this decision was made and that we had the courage to make it and thus get out of the vicious circle in which we have been for the last several decades...."²

All reservations except those for Scheduled Castes were being abolished. Even these were being retained "reluctantly". He would have wanted even these to go. In any case, they were being retained only for ten years....

The focus in that discussion and in that letter was on reservations in legislatures. Panditji's aversion to reservations in Services was much stronger. He was strenuously opposed to them. He was certain they would foment second rate and third rate standards, that they would consign the country to mediocrity and worse.

Even as the Government set up the Backward Classes Commission under the Chairmanship of Kakasaheb Kalelkar, and even in the letter he sent to the Chief Ministers about the setting up of the Commission, and in which he told them that its work would touch the lives of over 14 crore people, Panditji wrote, "This minute division of our people in castes and groups is a terrifying factor. Until we break down these barriers and, in effect, break down the caste system, we shall never

¹*Constituent Assembly Debates*, Volume VIII, 26 May, 1949, pp. 329-32.

²Jawaharlal Nehru, *Letters to Chief Ministers, 1947-64*, Volume I, 1947-49, 3 June, 1949, p. 363.

wholly get over the difficulties which have faced us...."¹ A while later, inaugurating a conference on Tribal Affairs, he declared that the Government aims "ultimately at removal of all these appellations, descriptions and names which ideologically and physically separate the people as the Depressed Classes, the Harijans, the Scheduled Castes, the Scheduled Tribes, and so on...."²

"It cannot be denied," Pandit Nehru's government informed Parliament in its Memorandum on Action Taken on the Report of the Backward Classes Commission that "the caste system is the greatest hindrance in the way of our progress towards an egalitarian society, and the recognition of specified castes as backward may serve to maintain and even perpetuate the existing distinctions on the basis of caste." In 1961, the Home Ministry issued a circular to state governments on the matter: "While the state governments have the discretion to choose their own criteria for defining backwardness, in view of the Government of India it would be better to apply the economic tests than to go by caste."

That was the perspective at the time the Constitution was framed. That was the perspective during Panditji's time as he turned India towards the future. With that perspective, provisions of the Constitution were very carefully worded.

What the framers provided

The basic approach was specified in Articles 14, 15(1), 16(1), and 16(2).

Article 14 guaranteed equality to all: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." That was the fundamental guarantee.

Article 15(1) made that guarantee specific in one particular: "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them," it prescribed.

Article 15(2) guaranteed equal access for everyone to public facilities like wells, restaurants, etc.

Article 15(3) contained a proviso: it is important as it recalls the only categories for which the framers were prepared to countenance

¹*Ibid.*, Volume III, 1952-54, 18 March, 1953, pp. 270-71.

²*Jawaharlal Nehru's Speeches, 1953-1957*, Publications Division, New Delhi, 1958, p. 459.

curtailment of equal provisions. *Article 15(3)* provided: "Nothing in this article shall prevent the State from making any special provision for women and children." Notice again: the only categories for which special provisions were envisaged were women and children. In particular, notice that no exceptions were envisaged on the basis of caste.

Article 16(1) made the fundamental guarantee of equality contained in Article 14 specific in another particular, one that was particularly important in those days when job opportunities were much more restricted than they are today, and governmental jobs were looked up to much more than is the case now: "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State," Article 16(1) prescribed.

Article 16(2) did for governmental employment what Article 15(1) did for a citizen's living in general: "No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State," it prescribed.

Article 16(4) contained a proviso, and again it is important as a reminder of what the framers of the Constitution envisaged. This clause provided: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

Even at this preliminary stage we should note four points of significance as they bear on everything that we shall encounter from now on:

- ❑ The fundamental guarantee in every provision was of equality, of non-discrimination.
- ❑ Caste was most consciously eschewed: the proviso to Article 15(1) spoke only of *women and children*; Article 16(4) spoke only of "any backward class of citizens."
- ❑ Where caste was mentioned, it was only to prohibit discrimination on grounds of caste.
- ❑ Where "equality" was made specific – in Article 16(1) in regard to employment under the State, for instance – the expression that

was used was “equality of opportunity”, an expression that, we shall soon see, has been buried deep under the rhetorical flourishes of progressives.

Three other provisions had a bearing on the questions that we shall consider, and they were to come into play almost as soon as the Constitution was adopted.

The first of these was *Article 29*. It had two clauses. The first provided, “Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.” Again, notice that the word “religion” was *not* mentioned: contrast that with the way this provision – and the succeeding *Article 30* – are invoked these days to assert, for instance, “rights” of Muslims *qua* Muslims. For our present discussion, however, the second clause of *Article 29* is what is important: it was to have an immediate consequence. This clause provided: “No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”

The next *Article* that was to be invoked in a manner that led to changes that we shall encounter in a moment was *Article 46*. It was a provision in the – non-enforceable – Directive Principles part of the Constitution. The *Article* provided, “The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.” Again, notice that the *Article* talked of “weaker sections of the people.” The only castes that were mentioned were “Scheduled Castes”.

Finally, the framers incorporated a vital caveat to special measures that might be instituted to induct members of Scheduled Castes and Scheduled Tribes into governmental services. *Article 335* provided, “The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.”

Alterations and additions

It so happened that in Madras, a student who had done manifestly well in the examinations but who happened to have been born to parents who were not from among the Scheduled Castes was denied admission, and those who had fared much worse than him, but who happened to have been born to Scheduled Caste parents, were granted admission. The decision was challenged. The Madras Government argued that Article 46 – a Directive Principle – overrode Article 29(2); that, as one of the special measures that the State was to take for the advancement of Scheduled Castes, it was entitled to grant admission to the students who had done poorly in the examinations and deny it to the non-Scheduled Caste student who had done well.

The Supreme Court rejected the argument decisively. Directive Principles cannot override Fundamental Rights, it held. In particular, in view of the prohibition contained in Article 29(2), the meritorious student cannot be denied admission on grounds of his caste, and this is what has manifestly been done, it held.¹

This ruling led to a provision being incorporated in the first amendment to the Constitution. A new clause was added to Article 15, clause (4). It provided: "Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

A pattern forms

This pattern was to be repeated again and again: the courts would try to stem the tide with some dyke; politicians would blow it up. And as political parties came to depend more and more on sectional appeals, in particular on stoking castes, the alterations and additions became more frequent, and of ever increasing consequence.

From *M.R. Balaji* to *Indra Sawhney*, cases we shall have occasion to study in some detail, the Supreme Court held that clause 16(4) was an exception to the fundamental guarantee provided to all citizens that they shall have equality of opportunity in competing for governmental employment. The Court held, as Dr. Ambedkar had

¹*The State of Madras v. Smt. Champakam Dorairajan*, AIR (1951) SC 226.

stated in this very context during debates of the Constituent Assembly, that an exception cannot be allowed to swallow the rule. Hence, the Court held, speaking generally, reservations should not exceed 50 per cent of the jobs being filled.

A state like Tamil Nadu had already crossed the limit: in it 69 per cent of the jobs had come to be reserved on the basis of birth. A typical sequence was enacted in the wake of the Supreme Court's decision in *Indra Sawhney*.

In 1993/94, as a consequence of the Supreme Court's judgment in *Indra Sawhney*, the Madras High Court held that, while reservations in admissions to educational institutions may continue at their existing levels for 1993/94, they must be brought down to 50 per cent from 1994/95.

The Government of Tamil Nadu filed an appeal against this order in the Supreme Court. The Court reiterated that reservations should not exceed 50 per cent.

On 9 November 1993, the Tamil Nadu Assembly unanimously passed a resolution requesting the Central Government to take steps to amend the Constitution so as to enable Tamil Nadu to continue its 69 per cent reservations. On 26 November, an all-party meeting emphasized that there should not be any doubt or delay in enabling Tamil Nadu to continue with its 69 per cent reservations.

The meeting over, the Tamil Nadu Assembly enacted a Bill – the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of appointments or posts in the Services under the State) Bill, 1993 – to continue the reservations, and sent it to the Centre under Article 31-C.

The Union Home Minister held another all-party meeting in Delhi on 13 July 1994. The consensus was that the President should give his assent to the Bill. Hence, the assent was given on 16 July 1994. Accordingly, the Bill was notified by the Tamil Nadu Government.

The state Government next requested the Centre to take steps to place the Act in the Ninth Schedule so that it could not be challenged in courts. The Constitution was, accordingly, and to much applause, amended for the 76th time in 1994, and the Tamil Nadu legislation was put beyond the reach of courts.

In a series of cases, culminating in *Indra Sawhney*, the Supreme Court had held that reservations could be provided only at the time of

entry to a service. It had given several reasons on account of which to set apart even promotions for some persons because of their birth was both unwise and unconstitutional. In particular, the Court had said that doing so would impair the efficiency of administration and would, therefore, fall afoul of Article 335.

In May 1995, again to much applause, and in response to yet another all-party consensus, the Constitution was amended for the 77th time. A new clause, (4A), was added to Article 16. This new clause provided: "Nothing in this article shall prevent the State from making any provision for *reservation in matters of promotion* to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State."

As we shall see, it became standard practice for governments to go on relaxing – to the point of setting aside completely – standards for inducting certain sections into governmental jobs as well as into educational institutions solely because of their birth. It turned out that, even after the standards had been lowered in this way, on occasion it was not possible to find enough candidates to fill the vacancies. Governments then provided that, when vacancies could not be filled in one year, they should be carried over to subsequent years. Now, it was evident that this way in a subsequent year, the general candidates seeking to get in on the basis of merit would get excluded from a majority of the seats – that well above 50 per cent of the seats would get reserved to be apportioned on the basis of birth. The matter came up before the Supreme Court several times. In *Indra Sawhney*, the Court reaffirmed that the total quantum of reservations – including the ones carried forward from preceding years – should not exceed 50 per cent.

The response of the political class was true to form: the Constitution was amended for the 81st time. The new Amendment specified that any provision for reservation made under clause (4) or clause (4A) of Article 16 shall be considered as a separate class of vacancies to be filled up in any succeeding year or years and this class of vacancies shall not be considered together with the vacancies of the year in which they were being filled up for the purpose of determining the ceiling of 50 per cent. A new clause – (4B) – was

added to Article 16. This new clause provided: "Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) *as a separate class of vacancies* to be filled up in any succeeding year or years and such class of vacancies *shall not be considered together with the vacancies of the year* in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year."

Standards for some categories of candidates kept getting more and more relaxed! The new, relaxed "standards" were challenged repeatedly in courts. The course they took through the courts – the way some progressive judges justified the relaxations, the way others shut their eyes to what was staring them in the face – is depressing in the extreme. We shall catch glimpses of the sequence, and the rationalizations as we proceed. For the moment, our concern is only with what the political parties did. In *S. Vinod Kumar v. Union of India*,¹ the Supreme Court held that, in view of the effect loosening standards would have on efficiency of administration, and in view, therefore, of how they would violate the command of Article 335, standards could not be relaxed or waived when it came to promotions in government services. The Supreme Court in this case reaffirmed what it had held in this regard in *Indra Sawhney*.

The Constitution was, therefore, amended for the 82nd time in 2000. Article 335 was henceforth to have a proviso which was to read as follows:

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and Scheduled Tribes *for relaxation in qualifying marks in any examination or lowering the standards of evaluation*, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

Even that has been far from the end. Promotions in government departments came to be determined by an innovation – the "Roster System". By this System, specified vacancies at each level came to be set apart for persons who belonged to such and thus caste: vacancies

¹(1996) 6 SCC 580.

numbers 23, 37, 51... shall be set apart for candidates from caste "X"... This "System" came to play havoc, and resulted in numerous "anomalies" and injustices that we shall encounter. Juniors got "accelerated promotion", and came to leap over their seniors – not because they had any extra merit but because of their birth. It resulted in much heartburn and demoralization.

There was one caveat to the system. Assume "A", a reservationist, got into service three years after "B". "A" leapt over "B" because a vacancy arose that was reserved for his sub-sub-caste. But eventually, when "B" got his promotion to the higher grade in the normal course, he would resume his seniority over "A". That was the rule – "accelerated promotions" but not seniority.

In fact, as the years passed, the reservationists began to get not just accelerated promotion but also "consequential seniority". That is, "A" now came to have a prior claim to get to the still higher level over "B" because, by virtue of the post having been reserved for his sub-sub-caste, he had been promoted to a particular level earlier than "B". In a series of judgments, as we shall see in greater detail later, such as *Union of India v. Virpal Singh Chauhan*¹ as well as *Ajit Singh Januja v. State of Punjab*,² the Supreme Court struck this practice down.

The consequence?

The Constitution was amended for the 85th time. The new clause which had been introduced in Article 16 – clause (4A) – by the 77th Amendment, was further amended, and the words "in matters of promotion, with consequential seniority, to any class" were introduced. Henceforth the clause was to read,

Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, *with consequential seniority*, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

Even that has not been the end. Not by a long shot. A long-running strand of litigation – relating to the right of "minority institutions" to

¹(1995) 6 SCC 684.

²(1996) 2 SCC 715.

run their affairs without interference from the State has brought down an unexpected meteor on the matter we are considering – that of reservations *per se*.

The latest distortion

The course this litigation, the decisions, and the actions legislatures have subsequently taken, show two separate sorts of distortions – each as ruinous as the other.

The framers of the Constitution had gone out of their way to reassure minorities. The two Articles that have a bearing on what we are at present concerned with are Articles 29 and 30.

We have already encountered Clause 2 of Article 29 which provides that “(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.”

Clause 1 of the Article provides, “Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.”

The clauses of Article 30 that are relevant to the questions we are considering provide:

- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
- (2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

The scheme of these two Articles is clear as can be. It is twofold:

- ☐ Minorities have the right to conserve their language, script and culture.
- ☐ They have the right to establish and administer educational institutions of their choice.

Clearly, the two Articles bear on each other. They address a common objective – to help minorities maintain their language, script and culture. The educational institutions that the framers had in mind and

which they assured the minorities they could set up and administer are the ones that have been set up to conserve their language, script and culture. The sort of institution that is contemplated is evident from the very words and context of the two Articles: an institution set up by members of a minority for preserving the language, script and culture of that minority. Say, some Muslims apprehend that Urdu is dying out; they set up an academy to conserve and teach that language – the Articles guarantee them the right to set up and administer that institution. The second clause of Article 30 makes the right more specific – it guarantees that the persons concerned can set up an institution of their choice: that they shall have the right to determine what kind of an institution will best help conserve Urdu – neither the State nor others will have the authority to tell them what kind of an institution will best sustain Urdu.

The first derailment was caused by plucking the words “of their choice” out of context, by tearing them away from the object for which Articles 29 and 30 gave minorities the right to set up and administer institutions. A normal engineering college or a college of dentistry can by no stretch be taken to be an institution that has been set up to help conserve the language, script or culture of the minority. Yet, provided the engineering or dentistry college has been set up by members of a minority, it was presumed to enjoy the protection of Articles 29 and 30, and thereby be beyond the reach of the State.

The result has been as predictable as it is iniquitous and absurd: if Ram Sharan sets up an engineering college, the State as well as the University concerned can prescribe all sorts of things it must do; if Mohammed Aslam sets up an exact clone of that engineering college across the road, teaching exactly the same subjects, using exactly the same textbooks, neither the State nor the University can regulate its functioning! Indeed, for decades, courts maintained that the State could not prescribe that “X” or “Y” be done by the institution *even if it was certain that these steps were imperative in the national interest*. But that is a stream different from our present concern – reservations.

Three cases lead us to the latest Amendment of the Constitution – one that has compounded the inequity and absurdity which the earlier falsification had embedded into the construction that came to

be put on these Articles. *T.M.A. Pai Foundation v. State of Karnataka* was decided by 11 judges.¹ This was followed by *Islamic Academy of Education v. State of Karnataka*² – a case that was decided by five judges. And that has been followed by *P.A. Inamdar v. State of Maharashtra*³ – another case that has been hotly contested, and eventually decided by a Bench of seven judges.

In *T.M.A. Pai*, the Supreme Court reaffirmed that, by virtue of Article 30(1), minorities, of course, have a right to set up educational institutions “of their choice”. Hence, these can be for imparting cultural, linguistic, religious, or, indeed, technical education. If a minority institution is not receiving aid from the state, the latter shall not regulate admissions – except that, in the interest of maintaining educational standards, the state may specify qualifications and minimum conditions for eligibility. The right to admit students is an integral part of administering an educational institution, hence the minority institution can determine its own admissions policy and procedure – so long as admissions are on a transparent basis and merit is adequately taken care of. The right to administer such institutions is not absolute – the state can intervene to ensure that educational standards and excellence are maintained – all the more so in regard to admissions to professional institutions.

Second, the Court ruled, the minority institution shall admit “a reasonable extent of non-minority students” – but how much shall be “a reasonable extent” would vary according to the type of institution, the courses that are being taught, the educational needs of the minority in that state, etc. The state government shall notify the percentage keeping these varied considerations in mind.

Third, it held, even minority institutions must ensure that their admissions procedures are fair and transparent, and that selection of students in professional and higher education colleges is on the basis of merit. “Even an unaided minority institution ought not to ignore the merit of the students for admission, while exercising its right to admit students to the college,” the Supreme Court emphasized, “as in that event, the institution will fail to achieve excellence.”

¹(2002) 8 SCC 481.

²(2003) 6 SCC 697.

³(2005) 6 SCC 537.

Fourth, the Court laid down, that, and this is to be especially so in regard to professional colleges, admissions should be on the basis of common entrance tests.

Notice, that throughout the ruling the Supreme Court is guided by a deep concern for merit and excellence, especially so in regard to subjects taught in “professional colleges” – engineering, medicine, and the like. Just because the institution is in some sense a “minority institution”, the merit of students should not get ignored while selecting some for admission; second, just because an institution is able to claim a minority status, it should not escape its duty to ensure excellence. This, the Court noted, is imperative as the interests of the country as a whole require that excellence be maintained – a truth that has been repeated often and which we will have occasion to recall in the context of other judgments of the same Court.

In *Islamic Academy of Education*, the Supreme Court held that, while minority institutions have autonomy in administration, the principle of merit cannot be sacrificed, as the national interest requires that there be excellence in professions. Doctors coming out of medical colleges set up and administered by minorities shall be treating citizens of all classes and religions, and not just members of the community someone from which has set up that college. Accordingly, said the Court, the State can insist on merit-based admission as a condition of extending recognition to that institution. And it prescribed that a Committee – headed by a retired judge of the High Court – be set up to oversee the examination for admissions.

In *P.A. Inamdar*, the Supreme Court has again emphasized that, whether the institution is a minority or non-minority one, the interest of the country requires that it maintain excellence, all the more so in higher classes and in technical courses. “Excellence in education and maintenance of high standards at this level [graduate and post-graduate studies, as also technical courses] are a must,” the Supreme Court declares. “To fulfill these objectives, the State can and rather must, in national interest step in. The education, knowledge and learning at this level possessed by individuals collectively constitutes national wealth” – words we should bear in mind as we come to pronouncements of the same Supreme Court in other cases. All this – the need to maintain excellence and the right and duty of the State to

ensure that the requisite standards are maintained – holds whether the institution is a minority one or non-minority one.¹

Furthermore, the Court has held, the State can prescribe that the institution set apart a certain proportion of seats for financially or socially backward sections of society. What this proportion should be, the Court has left to the state in which the institution is located to determine.

Notice that in each of these cases, both minority and non-minority colleges were involved, as well as colleges which were not availing of any aid from government. We will see the importance of this in a moment.

The Court has used three variables to classify the institutions, and thereby delineate the kind of authority that the State has in regard to each category of educational institution. The variables are: Is the institution a “minority” or “non-minority” institution? Is it receiving governmental aid? Is it seeking or has it received recognition from the State?

The Court has held that

- ❑ In regard to minority, unaided, unrecognized institutions, the State is not to mandate any quotas;
- ❑ In regard to minority, unaided colleges to which recognition has been accorded, the State can specify standards that entrants must pass but that it is not to regulate admissions or fees;
- ❑ In regard to minority, aided, recognized institutions, the State can regulate various aspects of the functioning of the institution without diluting the minority status of the institution.

As regards prescribing quotas, the Court has held that there is not much difference between unaided minority and unaided non-minority institutions: in either case, the State is *not* to prescribe quotas. It will pay us to spare a moment and glance at what the Supreme Court says in *P.A. Inamdar* while reaffirming this point:

So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of difference between non-minority and minority unaided educational institutions. We

¹*P.A. Inamdar, op. cit.*, at 603, para 134.

what it should be. When contacted for his comments, the Chief Justice expressed helplessness, telling the paper, "I have done my job, the rest I shrug off my shoulders."¹

And within days, the Minister for the new Ministry for Minority Affairs, announces that he shall notify Hindus as a "minority" in Punjab, Jammu and Kashmir, and in the Northeast. "This idea has been given to me by God," he declares.² The implication is as clear as it will be unstoppable: the moment Hindus are given reservations in these regions, they would be getting reservations *as a religious group*. That will open the doors for Muslims being given reservations *as a religious group* all over the country – including the Northeast and Punjab, and at least two parts of J&K: Jammu and Ladakh, in each of which they are a "minority"!

A fundamental issue

Quite apart from the other issues it raises, issues which we shall take up in turn, the sequence draws attention to a fundamental point in our constitutional jurisprudence. Time and again, the Supreme Court held that it was striking down a practice as the practice – reservations in excess of 50 per cent, reservations in promotions, etc. – violated a basic feature of the Constitution. Parliament overturned the judgment by altering the Constitution. Does such amendment erase the fact that the practice in question violates the Basic Structure of the Constitution? Is the Supreme Court to decide what constitutes the Basic Structure of the Constitution or the current majority in Parliament?

The questions

By what arguments has this descent, this vast departure from what the Constitution-makers had prescribed been justified? Not just by the political class, but by the "progressive" judges...

Where has this descent brought us?

Where will it take us?

Once politics set off in such directions, why does it become less and less possible to arrest the next lunge?

¹*The Indian Express*, 5 April, 2006.

²*The Asian Age*, 14 April, 2006.

The race then,
The race now

A fundamental lesson

"The introduction of this principle is shrouded in mystery. It is a mystery as to why it was introduced so silently and stealthily. The principle of separate representation does not find a place in the Act. The Act says nothing about it. It was in the directions – but not in the Act – issued to those charged with the duty of framing Regulations as to the classes and interests to whom representation was to be given that the Muslims were named as a class to be provided for... It is a mystery as to who was responsible for its introduction..."

That is B.R. Ambedkar writing about the Indian Councils Act of 1892 in his book, *Thoughts on Pakistan*.¹

There was no mystery, of course, as to the calculation which had led to separate electorates for Muslims. The story has been recounted often.²

The 1857 uprising had unnerved the British. But only for a while. Within two-three years of quelling it – that with great ferocity – they set to work putting together a version of it that would suit their ends: the uprising was confined to just a few pockets; it erupted as a result of local misunderstandings; there was no national sentiment behind it; the leaders themselves fought only for their feudal privileges – one local ruler because her son was not being recognized, another because his pension was being stopped, etc. That version became the only version – you will find it underlying even Panditji's *Discovery of India*.

¹Published in 1941, the book argued the case for Partition on the ground, among others, that, as an ideology, Islam makes it impossible for Muslims to co-exist with others in a multi-religious, multi-cultural country.

²The primary documents are cited in Rajendra Prasad's important work, *India Divided*, 1945/46, pp. 112-15, and are recalled in the Bharatiya Vidya Bhavan series *The History and Culture of the Indian People*, in particular in Volume X, Part 2, pp.320-25, and Volume XI, pp. 127-30, 147-49. See also, H.V. Seshadri, *The Tragic Story of Partition*, Jagrana Prakshan, Bangalore, 1984, pp. 35-43.

Of course, the British did not stop at writing history books. They commenced a series of *real politik* measures. The Bengal Army had shown alarming solidarity. It was disbanded. Henceforth, exceptions like the Sikhs apart, people of different sorts were to be mixed in each component unit. As Brahmins seemed to have provided the ideological leaven for the uprising, and to have constituted an all-India network, the campaign of calumny against them was redoubled.

But the main opportunity was seen elsewhere. Hindus and Muslims had fought together this time round. But there were cleavages between them. Officer after officer wrote that this division was what British policy ought to exacerbate, for in its sharpening lay the key to perpetuating the Empire: the Bharatiya Vidya Bhavan study cites several representative officials and policy makers to this effect. "*Divide et Impera* was the old Roman motto," wrote Lord Elphinstone, Governor of Bombay, whose name we still honour in the College, "and it should be ours." "The existence, side by side, of hostile creeds among the Indian people," wrote Sir John Strachey, "is one of the strong points in our political position in India".

What Ambedkar was to call the silent and stealthy introduction of separate electorates for Muslims *via* the backdoor – *via* the rules and directions framed under an Act which itself did not mention the matter – was a major instrument of this policy. Curzon partitioned Bengal along Hindu and Muslim lines for the same reason. "Even after this," S. Abid Hussain wrote in his notable book, *The Destiny of Indian Muslims*,¹ "sensible Hindu and Muslim leaders in East Bengal continued to oppose the partition. The fanatic *mullabs*, however, persuaded the Muslim masses that the government of the province had now passed into their hands and aroused in them a blind fury, which naturally took the form of a revolt against the landlords and traders who were predominantly Hindu, and communal riots raged throughout the new province." "The partition of Bengal had to be revoked after a few years on account of the countrywide agitation against it," Abid Hussain continued. "Yet, it sowed the seed of division in the hearts of the people that was one day to divide the whole country..."

¹Har-Anand Publications New Delhi, reprint, 1993. For the following, see in particular, pp. 82-85.

Curzon had to resign and leave. Minto succeeded him as Viceroy. To him and his colleagues, the surcharged communal atmosphere which the Bengal partition had generated was an opportunity – an ideal opportunity to wean Muslims away from the Congress by pressing further what Abid Hussain correctly calls “the most potent recipe.... for promoting a separatist movement among the Muslims,” namely communal representation.

Minto went about it in the predictable manner. “He (Minto) took elaborate steps to make it appear that communal representation was being introduced to meet the demand of the Muslims,” wrote Abid Hussain. “A secret message to Nawab Muhsin-ul-Mulk, who had succeeded Sir Syed (Ahmed) as Secretary of the Board of Trustees of the Aligarh College (the predecessor of what we know as the Aligarh Muslim University), was sent through its Principal, Mr. Archbold, that he should take a delegation of prominent Muslims to the Viceroy and ask for special concessions to the community....”

A delegation of Muslim leaders accordingly waited upon the Viceroy at Simla on 1 October 1906. It was led by the Aga Khan.

In its memorandum – which was actually the memorandum that had been settled by the Britishers themselves – the delegation requested that “The position accorded to the Mohammedan community in any kind of representation, direct or indirect, and in all other ways affecting their status and influence, should be commensurate not merely with their numerical strength but also with their political importance and the value of the contribution which they make to the defence of the Empire,” and with due regard to “the position they occupied in India a little more than a hundred years ago.” To ensure this, they said, Muslims should be given the right to select their representatives through separate communal electorates.

The Viceroy was graciousness itself. He told the deputation that “In any system of representation, whether it affects a Municipality, a District Board or a Legislative Council, in which it is proposed to introduce or increase the electoral organization, the Mohammedan community should be represented as a community, (and its) position should be estimated not merely on numerical strength but in respect to its political importance and the service it has rendered to the Empire. I am entirely in accord with you... I am as firmly convinced as I believe you to be, that any electoral representation in India would be

doomed to mischievous failure which aimed at granting a personal enfranchisement, regardless of the beliefs and traditions of the communities composing the population of this continent."

Lady Minto who, as she wrote in her journal that evening, had gone in by a side door with the girls to watch the proceedings, was exultant: "This has been a very eventful day – an epoch in Indian history," she wrote, and quoted a letter an official had sent within hours of the deputation's visit: "I must send Your Excellency a line to say that a very, very big thing has happened today, a work of statesmanship that will affect India and Indian history for many a long year. It is nothing less than the pulling back of sixty-two millions of people from joining the ranks of the seditious opposition."

In his Address as President of the Congress, Mohammed Ali, who was to shoot into such prominence in the Khilafat Movement, said that the deputation was "a command performance". Lady Minto herself referred to it as the "engineered" deputation. Maulvi Sayyid Tufail Ahmad Mangalori later revealed in a detailed account how the composition of the delegation, how the memorandum and demands to be submitted had all been settled between Archbold, the Principal of Aligarh, and Dunlop Smith, the Private Secretary to the Viceroy. Nor, as Tufail Ahmad's account revealed, were the plans confined to India. Simultaneously, with the delegation being received by the Viceroy in Simla, a series of articles began appearing in the British press in London – how India was not one nation, how it was not suited for democratic institutions, how Muslims were standing by the Empire, how Muslim statesmanship had pricked the bubble of the Bengal agitators...

The consequences – both immediate and eventual – were exactly as the British had intended. The former were captured well by the Secretary of State for India in London, John Morley. Upon receiving an account of the proceedings, he wired Minto: "*Morley to Minto* – 'October 26 – All that you tell me of your Mohammedans is full of interest, and I only regret that I could not have moved about unseen at your garden party. The whole thing has been as good as it could be, and it stamps your position and personal authority decisively. Among other good effects of your deliverance is this, that it has completely deranged the plan and tactics of the critical faction here, that is to say it has prevented them from any longer representing the Indian

Government as the ordinary case of bureaucracy versus the people..." The "people" would not now be seen as one. The situation would now be seen not as "British Government versus the people of India" but as "Hindus versus Muslims."

The eventual consequence was captured just as well, by the Aga Khan who had led the "engineered" delegation. In his *Memoirs*, he wrote, "Lord Minto's acceptance of our demands was the foundation of all future constitutional proposals made for India by successive British Governments, and its final, inevitable consequence was the partition of India and the emergence of Pakistan."

What made the device so potent?

The key was to hold out a benefit which the Muslims could get *as Muslims*, which they could get because *they were different from*, and *only by remaining different from the rest*. Once such a benefit is introduced, politics, power revolve around that pivot. Those who want to lead the group compete as *leaders of that group*. They strive to outdo each other in *differentiating* that group and espousing the interest *of that group*. Competition does the rest: not just 10 per cent of seats but (10+X) per cent; not just separate electorates, a separate country...

The key is always that germ – a benefit which members of the group can get only by being different from the rest. When the criterion of that difference is race, religion, caste, language, sex, the severance of the group from the community is ensured to a certainty. In his book, *Modern Islam in India*, published in the 1940s when memories of the stratagem were fresh, W.C. Smith nailed the point. The separate electorates led Muslims, as they had been designed to lead them, he observed, "to vote communally, think communally, listen only to communal election speeches, judge the delegates communally, look for constitutional and other reforms only in terms of more relative communal power, and express their grievances communally."¹

The same stratagem was deployed for segment upon segment of our people. Recall M. Macauliffe's observation in his well-known 1903 work, *A Lecture on the Sikh Religion and its Advantages to the State*: "At former (Census) enumerations village Sikhs in their

¹Wilfred Cantwell Smith, *Modern Islam in India*, Second Revised Edition, 1946, reprint, Usha Publications, New Delhi, 1979, p. 216.

ignorance generally recorded themselves as Hindus, as indeed they virtually were. With the experience gained by time, a sharp line of demarcation has now been drawn between Sikhs and Hindus..." The Census was just one instrument. Sikhs were joining the Army. Ceremonies were introduced in the Army that would instill and widen the feelings of separateness among Sikh recruits.

As these efforts were going on to drag Sikhs and others away from Hindus, a parallel effort was on to whittle down the number of "Hindus". The move preceding the 1911 Census was typical of the maneuvers. Provincial Superintendents were instructed to enumerate castes and tribes that had been returned or classified as "Hindus" but which could be said not to subscribe to a given set of "beliefs" or which suffered some disabilities. In each instance, the Superintendents were to ask whether the caste or group

- ☐ Denies the supremacy of the Brahmins;
- ☐ Does not receive the *mantra* from a Brahmin or other recognized Hindu *guru*;
- ☐ Denies the authority of the Vedas;
- ☐ Does not worship the great Hindu Gods;
- ☐ Is not served by good Brahmins as family priests;
- ☐ Has no Brahmin priests at all;
- ☐ Is denied access to the interior of ordinary Hindu temples;
- ☐ Causes pollution by (a) touch, (b) within a certain distance;
- ☐ Buries its dead;
- ☐ Eats beef and does not reverence the cow.

Using these "tests", the Census officers were able to report for province after province how vast numbers did not fall within the circumference. The questionnaire ignited strong protests. Nationalists expressed alarm. Eventually, it was decided that the respondent shall be taken at his word: if he said he is a Hindu, "Hindu" is what shall be recorded in the religion column.¹

Tribals and the lower castes had always been the special target

¹For a glimpse of the manoeuvre, see, *Census of India, 1911, Volume I, Part I, Report*, pp. 116-17, para 155; and *Census of India, 1911, Volume VII, Bombay, Part I, Report*, pp. 55-56, para 113. The protests continued for long, and were finding echoes in the Central Legislative Assembly even three decades later: see, for instance, Home Department Files, F. 122/29-Public, F. 45/30/30-Public 1930, F. 45/46/30-Public.

of both – the British administration as well as the missionaries. From the 1911 Census itself, Scheduled Castes were taken out of “Hindus”. It so happened that a number of Muslims and Christians returned a caste also. By the 1931 Census, while “Hindus” were to be split into different castes, and these large chunks – Scheduled Castes and Tribes – were to be reported outside the total of Hindus, no caste was to be recorded for Muslims and Christians! In a word, Hindus were to be split into fragments; Muslims and Christians were to be shown as single blocks.

A separate category was created to hive tribals out of Hindus – they were to be enumerated in the Census as “Animists”, *not* Hindus. Successive Census reports detailed the insuperable difficulty in separating “Animism” from “Hinduism”. They pointed to the result – the extreme fluctuations in the count of “Animists”. They nailed the reason for these fluctuations: as Hinduism is a continuum of beliefs and practices, as it is an inclusive faith, the enumeration has come to depend on the whims and “idiosyncrasies” of the enumerators, the officials wrote. One after the other report counselled that the category be abandoned. But that was the one thing that was *not* to be done. Thus, while in the 1931 Census “Animism” was dropped, it was replaced by “Tribal religions”. This new category was triply useful. It reduced the proportion of Hindus in the population. Instead of being devoted to a miscellaneous collection of superstitions, each tribe now had a proper “religion”. And instead of there being just one category – “Animism” – there were now many, many “religions”. The separateness of tribals was given institutional form in the proposals in that other, command performance, the report of the Simon Commission. The exact same stratagem and sequence were repeated in the case of several other groups – Satnaamis, Kabirpanthis, Arya Samajis, and of course the Brahmos.... “India” is not a country. It is a zoo....¹

The stratagem of detaching the lower castes from Hindu society reached its apogee at the Round Table Conference. The British had diligently invited and most carefully selected “representatives” of various “interests” who would be available to neutralize Gandhiji.

¹On all this, see, my *Missionaries in India, Continuities, Changes, Dilemmas*, ASA, New Delhi, 1994, pp. 182-99; H.V. Seshadri, *The Tragic Story of Partition*, Jagrana Prakashan, Bangalore, 1984, pp. 35-43.

So much so that the Prime Minister was able to taunt Gandhiji – here are representatives of the princes, of Muslims, of the untouchables, of chambers of commerce and industry; whom do you represent? Gandhiji was quick as usual – the women of India!

The British primed their band of delegates. The last straw was the demand they engineered to parallel the Minto-manoeuvre, the demand that they create a separate electorate for the Scheduled Castes. Gandhiji had all along been apprehensive of their design. He had been fighting it. In London on the sidelines of the Conference, he strained his utmost to counsel the key Indians on whom the British were relying for the purpose not to become instruments of the British stratagem. He was heartbroken as they went ahead and put forward the fatal demand that had already wreaked havoc – separate electorates for Scheduled Castes too. This is nothing but a “modern manufacture of Government,” Gandhiji said, and told the British that he would resist it with his life.

He had but to leave Britain and the Government announced the infamous “Communal Award” decreeing separate electorates for the Scheduled Castes. Gandhiji was arrested upon his return to India. When all his efforts failed to persuade the British and the Indians who had made themselves available to the British for furthering their design, he commenced his fast-unto-death. The British Government had to rescind its “Award”.

But Gandhiji had to agree to the “Yeravda Pact” by which the Congress “voluntarily” conceded reservations for *Harijans* in legislatures.¹

That is the first lesson that a polity must bear in mind when it extends a benefit, when it launches a scheme, when it uses a criterion: politics congeals around whatever criterion is selected for State policy and programmes; interests get vested around it; relations of power, of patronage solidify around that criterion. If the criterion for reward is achievement, people strive and exert. When, as in the Gadgil formula, states that remain poor get higher allocations; if, as in the formula used by the Finance Commission, states that have higher deficits get larger subventions from the Centre, there will be that much less

¹The chain of events is described in my *Worshipping False Gods: Ambedkar, and the facts that have been erased*, ASA, New Delhi, 1997.

incentive to attend to governance. If the same overall amounts are distributed in accordance with the *improvements* that the states have affected, they will have a goad to improve, and thereby alleviate their problems as well as those of the country. If individuals and groups get rewards on the basis of their being *different* from the rest, leaders will foment a politics that exacerbates the difference. If the criterion for that differentiation is religion or birth as in caste, politics will whirl around, power will congeal around these, and the chasms in society will widen to the point of sundering.

Do W.C. Smith's words not describe to the dot the mentalities that have coagulated around caste in states like U.P. and Bihar, the mentalities that politicians there have stoked since V.P. Singh lunged for Mandal? One just has to replace "caste" for "communal" and the words fit precisely: "The caste-based reservations have compelled groups to vote caste, think caste, listen only to casteist speeches, judge the delegates and officials by caste, look for constitutional and other reforms only in terms of more relative caste power, and express their grievances by caste."

And the country has been set back. It isn't just that caste has been given a new lease of life. New "castes" have been manufactured. After all, Scheduled Castes are not a "caste" – they are the collection of castes that have been notified by sundry governments in a Schedule under Articles 340 and 341 of the Constitution. Yet, listen to politicians who inflame "*Dalits*" – a word carefully chosen not just to identify a group but to instill in it a sense of grievance; and in the "Not *Dalits*", a sense of guilt. Similarly, the "OBCs" were not to be a caste at all: the framers of the Constitution scrupulously shunned the word "*castes*" in this context and used the expression "other socially and educationally backward *classes*." But listen not just to politicians but to people in U.P. and Bihar and you will hear a new "caste" – the "OBC". Nor is it just that new "castes" are being created, casteism reigns: politicians stoke voters by caste; individuals see themselves as and others – for instance, officers – as members of this caste or that.

The very thing that was shunned, becomes central

There are innumerable judgments in which the Supreme Court has declared that

- ❑ Every word used in the Constitution has significance;
- ❑ When the Constitution uses one word rather than another, it does so with due deliberation;
- ❑ This is especially so when it uses one word in one context and either omits it in another, or uses a different one in another context. For instance, if an Article of the Constitution or even an ordinary law mentions that, before doing such and thus, Government would have to come back to Parliament, and another Article or law does not say so, that omission is not put to inadvertence. That the requirement has not been mentioned in the latter case, is taken to mean that in this instance the Government can decide on the matter without coming back to Parliament.

Against these propositions that judges reiterate times without number, put the Articles in which "caste" and "class" are mentioned and you will see that the scheme of the Constitution is clear as can be:

- ❑ Except when it is speaking of Scheduled Castes, where it uses the word "caste" the Constitution does so to lay down a negative; namely, that caste shall *not* be a ground for discrimination.
- ❑ Where the word "caste" is used to single out a group for special care or measures, it is only in regard to Scheduled Castes.
- ❑ In regard to other matters and contexts, the word "castes" is studiously shunned. The expressions that are used are "weaker sections of the people" or "socially and educationally backward classes."

Yet, today

- ❑ When leaders and political parties mobilize groups to demand reservations, they mobilize them as *castes*.
- ❑ When their case is urged before Commissions, it is argued that they be given reservation as *castes*.
- ❑ When Commissions examine the case, and eventually recommend that reservations be given, they recommend that reservations be given to such and thus *castes*.
- ❑ When Governments decree reservations, they are given to *castes*.
- ❑ The reservations that the courts uphold are reservations to *castes*.

How according to the courts must the "classes" be identified? How are they identified in practice?

Here is what the Supreme Court says in a representative passage, this one from *State of Andhra Pradesh v. P. Sagar*:

Article 15 guarantees by the first clause a fundamental right of far reaching importance to the public generally. Within certain defined limits an exception has been engrafted upon the guarantee of the freedom in Clause (1) *but being in the nature of an exception, the conditions which justify departure must be strictly shown to exist*. When a dispute is raised before a Court that a particular law which is inconsistent with the guarantee against discrimination is valid on the plea that it is permitted under Clause (4) of Article 15, *the assertion by the State* that the officers of the State had taken into consideration the criteria which has been adopted by the Courts for determining the socially and educationally backward classes of citizens, *would not be sufficient to sustain the validity of the claim*. The Courts of the country are invested with the power to determine the validity of the law which infringes the fundamental rights of citizens and others and when a question arises whether a law which *prime facie* infringes a guaranteed fundamental right is within an exception the validity of that law has to be determined by the Courts on materials placed before them. By merely asserting that law was made after full consideration of the relevant evidence and criteria which have a bearing thereon, and was within the exception, the jurisdiction of the Courts to determine whether by making the law a fundamental right has been infringed is not excluded.

The High Court has repeatedly observed in the course of their judgement that no materials at all were placed on the record to enable them to decide whether the criteria laid down by this Court for determining that the list prepared by the Government conformed to the requirements of Clause (4) of Article 15 were followed. On behalf of the State it was merely asserted

that an enquiry was in fact made with the aid of expert officers and the Law Secretary and the question was examined from all points of view by the officers of the State, by the Cabinet sub-Committee and by the Cabinet. *But whether in that examination the correct criteria were applied is not a matter on which any assumption could be made especially when the list prepared is ex facie based on castes or communities and is substantially the list which was struck down by the High Court in P. Sukhadev's case.* Honesty of purpose of those who prepared and published the list was not and is not challenged but the validity of a law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the law maker was satisfied that what he did was right or that he believes that he acted in a manner consistent with the constitutional guarantees of the citizens. *The test of the validity of a law alleged to infringe the fundamental rights of a citizen or any act done in execution of that law lies not in the belief of the maker of the law or of the person executing the law but in the demonstration by evidence and argument before the Courts that the guaranteed right is not infringed.*¹

Nothing could be more explicit: greatest care to be taken; criteria must accord with the Constitution; the say-so of a government will not be enough; the courts *will* examine the list....

And what happens in practice?

The Commission that is scripture today

A volume can be readily compiled examining the work of commissions and committees that state governments have set up to draw up the lists of castes. That is scarcely necessary as we have a handy example in the *locus classicus*, indeed the scripture on the subject, namely the report of the Mandal Commission itself. How did that Commission identify the "Other Backward Classes" whose cause it championed? What was the basis on which suddenly in 1991/92, instead of 22.5 per cent seats being assigned on the basis of birth, 50 per cent came to be assigned in that way?

The Commission is punctilious in setting standards. Criticizing the First Backward Classes Commission set up in 1953, the Mandal Commission notes that the Commission specified certain criteria for adjudging backwardness and then proceeded to list 2,399 castes as backward. "But", it says, "it is not clear from the report as to how the lists of backward classes were derived from the application of that

¹ *State of Andhra Pradesh v. P. Sagar*, AIR 1968 SC 1379, paras 9, 10.

criteria," that "in the absence of any explanation of the rationale for fixing different percentages for different groups of posts, etc., the approach appears somewhat arbitrary."

And how does the Mandal Commission itself proceed?

It has to determine first what percentage of our people are "Other Backward Classes".

But there has been no castewise enumeration of our population *since* 1931.

No matter. The Mandal Commission just assumes that the relative rates of growth of the population of different castes of Hindus have been identical. And thus concludes that SCs, STs and OBCs today are the same percentage of the total Hindu population as they were in 1931!

Even that does not settle the matter. For the Commission is determined to identify "Other Backward Classes" among other religions too – religions which have been priding themselves on the ground, and whose propagandists for centuries have been running Hinduism down on the ground that, unlike Hinduism, they have no castes among them.

It is evident from the Mandal Commission's Report that there was no castewise enumeration of non-Hindus even in 1931.

No problem for the Mandal Commission.

It is just a matter of making one more assumption!

"Assuming," the Mandal Commission declares, "that roughly the proportion of OBCs amongst non-Hindus was of the same order as amongst the Hindus, population of non-Hindu OBCs was also taken as 52 per cent of the actual proportion of their population of 16.6 per cent, or 8.4 per cent"!

Two *assumptions* and we have a *conclusion*.

"Thus", writes the Mandal Commission, "total population of Hindu and non-Hindu OBCs naturally added up to nearly 52 per cent (43.7 per cent plus 8.4 per cent) of the country's population." QED.

So, the basis is nothing but the 1931 Census.

The basis of it all

And what did the 1931 Census itself say about the lists and figures of castes that it listed?

What is a caste? What distinguishes one caste that the Census

enumerator was reporting from another? "The term 'caste' needs no definition in India," the Census reports. Could it be that we can get a definition of the other two categories that the Census uses – "tribe" and "race"? Can we get a definition of caste by looking at what it is not?

"'Tribe' was provided to cover many of the communities still organised on that basis in whose case the tribe has not become a caste," the Census recorded. In a word, a "tribe" is that thing which has not become the thing that needs no definition.

As for "Race", the Census said, "no attempt was made to define the term 'race', which is generally used so loosely as almost to defy definition." "Nor is it intended to do anything so rash as to define it here, while in the Census Schedule its very looseness enabled it to cover returns which, though not strictly referable to the same category, were quite adequate for the purpose intended, which was primarily to obtain a return of Indians to whom the terms 'caste' and 'tribe' are inapplicable and a means of identifying Anglo-Indians whose birthplace might be an inadequate means of identification."¹

This procedure – definition by residuals – presented many problems, and the Census was candid about them. For instance, it pointed out that Indians who had been classified as "tribals" formed a very heterogeneous group. Even the simplest step – that of comparing these figures with what had been reported in previous enumerations, the Census Commissioner wrote, "has been made very difficult by the irritating practice of some missionaries to induce their converts to abandon their tribal name and return themselves nondescriptly as 'Indian Christians', as though they had some cause to be ashamed of their forefathers."²

The difficulties were compounded by several factors, the Census recorded. On the one hand were movements – especially influential in Punjab and Bengal – advocating that caste should not be enumerated as, by listing it, Government was perpetuating and reinforcing an institution that was harmful; and, on the other, was persistence: even though some religions – Islam, Christianity,

¹*Census of India, 1931, Volume I-India, Part I, Report*, Manager of Publications, Delhi, 1933, p. 425.

²*Ibid*, p. 430.

Sikhism – foreswore caste, caste, the Census Commissioner noted, was not ignored even after conversion.¹

Blurring of boundaries

But the basic problem was that “the institution [of caste] itself is undergoing considerable modification,” the Census reported, “There is a tendency for the limitations of caste to be loosened and for rigid caste distinctions to be broken down.”² Indeed, this was the reason on account of which the Census Commissioner argued that enumerating persons by caste would not revive caste – the institution is in such flux that there is no danger that mere enumeration will revive it, he reasoned.³

There were several factors that were eroding the distinctions between castes, the Census reported.

“There is.... apparently a tendency towards the consolidation of groups at present separated by caste rules,” the Census reported in passages that should be bookmarked for the time when we will turn to judges of the Supreme Court who write about the institution as if we are still frozen in the days – in fact, in the *pages* – of Manu. “The best instance of such a tendency to consolidate a number of castes into one group is to be found in the grazier castes which aim at combining under the term ‘Yadava’ Ahirs, Goalas, Gopis, Idaiyans and perhaps some other castes of milkmen, a movement already effective in 1921.” As typical of this movement it cited also “the desire of the artisan castes in many parts of India to appear under a common name; thus carpenters, smiths, goldsmiths and some others of similar occupations desired in various parts of India to be returned by a common denomination such as *Vishwakarma* or *Jangida*, usually desiring to add a descriptive noun implying that they belonged to one of the two highest *varnas* of Hinduism, either Brahman or Rajput.” The Census illustrated this tendency with a little table, one that is as telling a piece of evidence as anyone would need that argues against the rigidity that our activists, politicians and even judges ascribe to the caste system, evidence that gives us a glimpse of the fluidity of the caste system even in the 1930s:

¹*Ibid*, pp. 430-31.

²*Ibid*, pp. 430, 432.

³*Ibid*, p. 432.

Some new ranks claimed by old castes

Old name	1921 claims	1931 claims
Kamar	Kshatriya	Brahman
Sonar	Kshatriya Rajput	Brahman Vaisya
Sutradar	Vaisya	Brahman
Nai	Thakur	Brahman
Napit	Baidya	Brahman
Rawani (Kahar)	Vaisya	Kshatriya
Muchi	Baidya Rishi	
Chamar		Gahlot Rajput

Of the two higher appellations, the Census recorded, "Brahman was usually desired at this Census." But there were many variations: "in some cases a caste which had applied in one province to be called Brahman asked in another to be called Rajput and there are several instances at this Census of castes claiming to be Brahman who claimed to be Rajput ten years ago."

And there was a mix of motives and objectives in demanding these changes: in part there was "a very proper desire to rise in the social estimation of other people;" there was also a political objective: "It [the movement for consolidation under a new, higher appellation] is also attributable in some castes to a desire for the backing of a large community in order to count for more in political life." About the criterion on which our caste-is-class progressives always insist, inter-caste marriage, the Census recorded, "There is little evidence as yet that intermarriage is being practised within these consolidating groups, but," it added, "it is a development the possibility of which may not be overlooked, and the Census Superintendent of the Central Provinces quotes 'specific instances... of marriage between members of different sub-castes of Brahmans, and between members of different sub-castes of Kalars, whose union would formerly have been condemned.'"

The Census Commissioner recounted the difficulties in "stating a caste in the case of inter-caste marriages," adding a sentence half of which will fortify our progressives - "There is, however, a very

marked repugnance in all the castes who have anything to say about the matter to being designated *sudras* – and half of which will dismay them – “though the term seems to have been quite respectable up to a comparatively recent date.” “On the whole it is fair to conclude that there is a tendency for the limitations of caste to be loosened and for rigid caste distinctions to be broken down.” Enumerating caste at this juncture will help assess the social and economic condition of the person and the group, he wrote, adding, and this again bears testimony to the pace at which the boundaries were being eroded, “It is possible that in another ten years it may be feasible to substitute some other criterion and it would certainly be desirable, if it were so feasible, to adopt for Census purposes some much larger grouping than that of castes.” “Every Hindu who claims to be a Hindu at all would claim to be either Brahman or Kshattriya,” the Census recorded giving reasons why *varna* would be a poor guide in enumeration. “Even castes of Chamars in the United Provinces have dropped their characteristic nomenclature at this Census and returned themselves as Sun- or Moon-descended Rajputs,” though on the observation of Census officials, “This, of course, does not imply any correspondingly respectful treatment of them by their neighbours.”

But as far as enumeration is concerned, the difficulty was well-nigh insuperable: “It is obviously impossible for the Census authorities to do anything other than accept the nomenclature of the individuals making the return, since to discriminate and to allot to different groups would involve entering into discussion on the basis of largely hypothetical data. Experience at this Census has shown very clearly the difficulty of getting a correct return of caste and likewise the difficulty of interpreting it for Census purposes.”

Yet, that is the enumeration that the Mandal Commission, and following it courts as much as politicians and activists have taken as writ in stone. The Census reproduced what the Superintendent of Census Operations for Madras had written in this connection:

Sorting for caste is really worthless unless nomenclature is sufficiently fixed to render the resulting totals close and reliable approximations. Had caste terminology the stability of religious returns, caste sorting might be worth while. With the fluidity of present appellations, it is certainly not ... 227,000 Ambattans have become 10,000... Navithan, Nai, Nai Brahman, Navutiyar, Pariyari claim about 140,000 – all terms unrecorded or

untabulated in 1921... Individual fancy apparently has some part in caste nomenclature. For example, an extremely dark individual pursuing the occupation of waterman on the Coorg border described his caste as *Suryavamsa*, the family of the sun.

So widespread and difficult to pin down was this tendency that the Census observed, "Many of the claims made and appellations used recall irresistibly the ruse of that hero of W.S. Gilbert's who christened himself 'Darwinian Man'."

Nor should one forget the changes that were taking place at the base, in the mode of production as the Marxists would say – the spread of communications, as well as the wide sweep of the new trains and buses which were breaking down many of the taboos that were said to be characteristic of the caste system. And the effect of even these was complex, the Census pointed out. When transport was rudimentary, when communications were primitive, a group that migrated to another place lost contact with its original social group. It in a sense began anew. With easier transport, with better communications, the relationship survives, and so do some of the older practices – for instance, of marrying within the caste group.

For all these reasons, to get at a person's caste, the Census gave up what had been done in the recent censuses, and reverted to the norm that had been used in the Census of 1891 – that is, of tabulating the "traditional occupation" of the person, and ascribing a caste from that.¹

From our point of view, there is a preliminary and obvious consideration. The base of the enumerations that are used today for reservations is the 1931 Census. As castes were recorded in that Census by asking a person about his occupation, why not use "occupation" as the basis rather than "caste"? That would be secular, non-denominational, wouldn't it?

The reasons this step is not taken are as obvious as the step itself. Caste-based politics would be set back. Moreover, occupations change, and at an ever faster whirl in today's modernizing economy – that would knock the bottom out of the vote-banks that our "secular" politicians build up. Third, with modernization, ever new

¹*Census of India, 1931, Volume I, India, Part II, Imperial Tables*, Manager of Publications, Delhi, 1933, p. 521.

occupations are coming up on the one side, and, on the other, they are ever more finely divided – into which box will a leader building himself on caste slogans put a man who is marketing a management programme?

But to proceed, going by a person's occupation and then ascribing a caste to her or him was the only practicable course for the Census officers, and yet it presented several difficulties – difficulties that are even more disabling for reservationists who, after all, insist on deriving social status and handicaps from the mere name of a caste. The Census Commissioner recorded, "The difficulty of classifying by occupation is instanced by the fact that cultivation in northern India is a most respectable occupation whereas in certain parts of southern India it is largely associated with the 'exterior' castes and is consequently less respectable. Similarly the term 'merchant' would cover all sorts of different social classes and units from the Gujarati *bania* to the gipsy Banjara." There were other changes that spoke to the loosening hold of rules that are referred to as immutable in our judgments and activist books. The Census Commissioner noted that while "in private intercourse, as in religious observances, the castes whose water cannot be accepted are held at as great a distance as before," "it is conceded that the position of individuals belonging to exterior castes (that is, to castes hereto described as 'depressed') has been much ameliorated as far as public life is concerned, and that untouchability has in that respect been very appreciably reduced."

The method was not entirely satisfactory for other reasons also. How an occupation is to be distinguished from a "traditional occupation" was not "always a non-contentious question". Similarly, often one caste had more than one "traditional occupation" – what is the "traditional occupation" of Gonds, to use the example that the Census listed? Basket-making, scavenging or music?

Because of these difficulties, the Census Department itself would be relieved the day it could give up the caste-wise enumeration, the Census recorded. It recalled a notorious theory – of adjudging by "the relative nasal index" – and noted with satisfaction that the theory had in the event failed. But the results of that attempt had been as troublesome as if it had succeeded, recorded the Census! "Every Census gives rise to a pestiferous deluge of representations, accompanied by highly problematical histories," it recalled, "asking

for recognition of some alleged fact or hypothesis of which the Census as a department is not legally competent to judge and of which its recognition, if accorded, would be socially valueless. Moreover, as often as not, direct action is requested against the corresponding hypotheses of other castes. For the caste that desires to improve its social position seems to regard the natural attempts of others to go up with it as an infringement of its own prerogative; its standing is in fact to be attained by standing upon others rather than with them. For these reasons an abandonment of the return of caste would be viewed with relief by Census officers." The time for doing so, however, had not yet come, the Census Commissioner noted. And added a proposal that showed the direction in which Imperial thinking was proceeding. "This question is one which it will only be possible to determine when the time comes, but if the exterior castes were to agree to return their religion or their community as 'Adi-Hindu' or by some similar adventitious label, it might be possible even to omit the return of caste, while in any case it would afford a collective term which might make it possible to ignore individual castes for the purpose of tabulation..."¹

In any event, the multiplicity of names and occupations was so great that the local Census offices were instructed to list only those castes which "the local Government considered of sufficient importance." The only exceptions were to be "the exterior castes" and a dozen or so selected castes. The consequence? "This has made it impossible to compile figures for all castes for all India," the Census reported.

The Census, therefore, candidly recorded, "The castes shown are representative only and not a complete tabulation of the whole population." The total population of what was then India was estimated as 352.8 million. As against this number, the total number covered by the caste-wise table was 220.7 million.²

The appellations

"The general adoption of so peculiar an adjective as 'depressed' to

¹*Census of India, 1931, Volume I-India, Part I—Report*, Manager of Publications, Delhi, 1933, p. 433.

²*Census of India, 1931, Volume I—India, Part II, Imperial Tables*, Manager of Publications, Delhi, 1933, p. 521; also *Part I, op. cit.*, pp. 432-33.

define a body of people admittedly millions strong," wrote M.W.M. Yeatts, the then Superintendent of Census Operations in the Madras Presidency and soon to be Census Commissioner for the country, "in itself indicates a far from precise differentiation. No final definition has ever been made so far of what constitutes 'depression' in this singular application of the term." *"What has happened in effect is that the category was created by saying that certain communities constituted it and thereafter communities have been added to or removed from the original list,"* he explained with a candour that our leaders would find embarrassing today. Nor ought this to cause surprise, Yeatts said: "One need not wonder at the absence of any final and exclusive criteria, for too many elements enter to permit of rigid demarcation or definition."¹

To explain how vexed is the problem, the Punjab report had

¹M.W.M. Yeatts, *Census of India, 1931, Volume XIV, Madras, Part I, Report*, Government of India Central Publication Branch, Calcutta, 1932, p. 345. In this section, sources are indicated by province and page number. Each of them refers to the 1931 Census volume for the province concerned. The publication details are as follows: J.H. Hutton, *Census of India, 1931, Volume I, India, Part I, Report*, Manager of Publications, Delhi, 1933; C.S. Mullan, *Census of India, 1931, Volume III, Assam, Part I, Report*, Central Publication Branch, Government of India, Shillong, 1932; A.E. Porter, *Census of India, 1931, Volume V, Bengal and Sikkim, Part I, Report*, Central Publication Branch, Government of India, Calcutta, 1933; W.G. Lacey, *Census of India, 1931, Volume VII, Bihar and Orissa, Part I, Report*, Superintendent Government Printing, Patna, 1933; W.H. Short, *Census of India, 1931, Volume XII, Central Provinces and Berar, Part I, Report*, Government Printing, C.P., Nagpur, 1933; M.W.M. Yeatts, *Census of India, 1931, Volume XIV, Madras, Part I, Report*, Central Publication Branch, Government of India, Madras, 1932; A.H. Dracu and H.T. Sorley, *Census of India, 1931, Volume VIII, Bombay Presidency, Part I, General Report*, Government Central Press, Bombay, 1933; A.C. Turner, *Census of India, 1931, United Provinces of Agra and Oudh, Part I, Report*, Civil and Military Gazette Press, Lahore, 1933; Khan Ahmed Hasan Khan, *Census of India, 1931, Volume XVII, Punjab, Part I, Report*, Central Publication Branch, Government of India, Calcutta, 1933; Satya V. Mukerjee, *Census of India, 1931, Volume XIX, Baroda, Part I, Report*, Times of India Press, Bombay, 1932; M. Venkatesa Iyengar, *Census of India, 1931, Volume XXV, Mysore, Part I, Report*, Government Press, Bangalore, 1932; Gulam Ahmed Khan, *Census of India, 1931, Volume XXIII, H.E.H. The Nizam's Dominions (Hyderabad State), Part I, Report*, Government Central Press, Hyderabad-Deccan, 1933; B.L. Cole, *Census of India, 1931, Volume XXVII, Rajputana Agency, Report and Tables*, Saraswati Press for Government of India, Meerut, 1932; Anant Ram and Hira Nand Raina, *Census of India, 1931, Volume XXIV, Jammu and Kashmir State, Part I, Report*, Ranbir Government Press, Jammu, 1933.

thought fit to reproduce the remarks of the Census Report of 1891, adding that "time has by no means brought about any mitigation of the difficulties." The Census Report had said then, "No one who has not gone into it himself has any idea of the extraordinary difficulty attending the whole subject." Even though the caste and sub-caste had been returned correctly "in a vast majority of cases", the Report had explained, that "still leaves room for an immense number of vagaries...." Among the sources of confusion it listed, were sub-caste being returned in place of caste; the name of the occupation being returned instead of that of the caste; or neither caste nor sub-caste being reported, "or in fact every kind of confusion must be expected." The pace at which the work has to be done, the pronunciation of the respondent, the comprehension of the enumerator.... "A Bedi for instance (with a soft *d*) is a man of a saintly family, while a Bedi (with a hard *d*) is a thing of naught, whom we have to class with the Kanjars."

Furthermore, the whole exercise was predicated on there being rigid lines of demarcation as between castes, and strict rules about marriage, inter-dining, etc. However, "society is not solid but liquid," Sir Denzil Ibbetson had pointed out in his Report for 1881. The liquid in India has been much more viscous, he had written, adding, however, "It is extraordinary how incessantly, in reporting customs, my correspondents note that the custom or restriction is fast dying out...." The Census Superintendent had also cited the 1911 Report to the effect that "My general conclusion is that there has been little change in the Province during the past thirty years with reference to the basis of caste distinctions, but that the restrictions have become very lax, the rules being disregarded with impunity with respect to inter-marriage and inter-dining, the traditional occupations are being given up owing to the functional revolution which is in progress, and general reaction has set in whereby members of lower or menial castes are trying to rise to the level of the higher ones, either by connecting themselves with a forefather belonging to one of those castes, or by discovering a new origin for their tribe or caste."¹ In a word, continuous testimony of flux, of blurring, from the reports of 1881, 1891 to 1911.

¹*Punjab*, pp. 323-24.

"To place each unit of Hindu community in his or her proper caste compartment under the correct sub-caste is today *a complete impossibility*," we are told in the Report for the Bombay Presidency, "because – (a) No really complete index of castes and sub-castes has yet been compiled; (b) In too many cases, the individual questioned is either ignorant of his own caste or unwittingly gives a wholly misleading reply; (c) It is unreasonable to expect, from the type of enumerator now employed, the degree of vigilance, the breadth of ethnical knowledge and the patience and persistence necessary to obtain really correct information."¹

Giving a series of examples of how individual castes and sub-castes could continue to be split into smaller and smaller entities, the Mysore Report stated, "the situation is full of anomalies and requires to be reviewed completely."²

The Census Commissioner of Bengal and Sikkim reported yet another difficulty that had confronted enumerators filling the caste column: There is no separate word in Bengali and the Indian languages current in Bengal, he wrote, for "race", "tribe", "nationality" and "caste". There are all sorts of difficulties in addition, he reported. Agitation has been growing in volume to have people report no caste at all, he wrote. Furthermore, some respondents report sub-castes, some only the caste. In other cases the difficulties are well nigh insuperable: for instance, the Kashtriya caste is itself so "vague and indeterminate" in Bengal, that when a respondent reports it, one does not know its significance. Even in regard to Brahmans, the effort to obtain sub-caste "proved no small embarrassment," he reported. Lists of castes and sub-castes were prepared based on earlier accounts and studies and circulated for comments and verification, he reported; and added that the replies that have been received serve only to reveal the difficulties in making out a satisfactory scheme.³

In province after province – Central Provinces and Berar, Rajputana Agency and others – the Census officers reported yet another impediment: even in trying to identify "exterior" castes – those who were regarded as untouchables and were to be listed in the Census as "depressed castes" – the Census officers reported that a sub-caste

¹*Bombay*, p. 379.

²*Mysore*, pp. 319-20.

³*Bengal and Sikkim*, pp. 421, 428, 429, 431-32.

regarded as polluting in one district is not regarded as polluting in the adjacent district.¹

Unable to rely on customs, beliefs and practices as criteria, Census operations had taken the short cut and recorded caste on the basis of occupation. But by the early 1920s, occupations were in flux. We have already noticed observations in this regard about the situation in Punjab, and even in the report of Sir Ibbetson for 1881. Change had spread to other areas. Its pace had accelerated. The Census officers of province after province noted the transformations that were taking place in economic operations in their jurisdiction. The areas under the Rajputana Agency were among those in which change was the slowest, and yet even in the Report for them we learn that "a report by traditional or general occupation would be valueless, for traditions are rapidly changing and in these days a Teli may be a merchant and a Rajput a mill operative."²

"It is not possible to estimate the extent to which the caste table has suffered as a result of these complications", the Report for Bihar and Orissa recorded. Among these complications was the factor to which we shall return in a moment – the sustained and strenuous efforts of many castes to use the Census as the occasion to raise themselves socially. The problem here was two-fold: the option could not be left to the enumerator to decide the caste to which the respondent belonged; but, "At the same time," the Census Superintendent for Bihar and Orissa added, given the inability of individuals to give a precise answer as well as the determination of groups to raise themselves, "the system of allowing so great a latitude to individuals in describing their caste will lead at no distant date, as increasing option is taken of it, to something approaching chaos in the Census figures."³

Several of the Census officers – of the Rajputana Agency, of Jammu & Kashmir, of Mysore – went to considerable length to describe the benign origin of the caste system and to stress that categorization was to be seen in other countries and societies also. Several of them pointed to the sense of security and identity that the system ensured. But there is little doubt that over time practices of the most distressing

¹ *Central Provinces and Berar*, pp. 365, 392; *Rajputana Agency*, pp. 126-27.

² *Rajputana Agency*, p. 123.

³ *Bihar and Orissa*, pp. 265-66.

and shameful sort had come into being. Some of them can only be described as idiotic. These practices had become the basis for division and subdivision. But every single Census officer reported that the practices were on the wane – that the lines distinguishing one group from the other were getting blurred, that members of one group after the other were crossing the line into other groups. In the Northeast, of course, the rigid divisions and “exterior” castes were unknown. “It is impossible,” the Assam Report recorded, “to lay down a simple test to distinguish members of the Hindu exterior caste in Assam from others.” The Report reproduced a note which had been originally prepared for the Indian Franchise Committee. The note had at length shown the inappropriateness of the expression “depressed castes”. The officer had recorded, “It will be noticed that I have not used the word ‘depressed’ for any of these three divisions. I have done this advisedly because the word ‘depressed’ is not, in my opinion, suitable as a description of the status of any caste in Assam. ‘Depressed’ as used in India in connection with caste has come to be associated particularly with persons belonging to certain castes in Madras who are unapproachable, whose touch necessitates immediate purification and who are not allowed to read in the schools along with other boys. There is, I am glad to say, no such degree of depression in Assam; an unapproachable caste is unknown here and boys of all castes are freely admitted into all schools and colleges. Nor are there any difficulties worth mentioning as regards the drawing of water by all castes from public ‘tanks’ and wells. Hence I would be loath to apply to any caste in this province an adjective which has come to connote an extreme state of degradation.” Given this situation, the correspondents were indeed at pains to explain how difficult it was for them to identify these exterior castes when “the whole matter was so indeterminate.”¹

Flux

“The adjective ‘fluid’ has often been applied to the Hindu caste system,” the Madras Report recorded, “and with much appropriateness.” A fluid takes the shape of the vessel within which it is contained but does not alter in volume and quantity, it explained.

¹Assam, pp. 209-10.

In the same way, individuals and groups were retaining the essentials of the faith "whereas the social incidents or customs" – the very basis on which one caste was being distinguished from the other, one sub-caste from the other – "which are in essentials superficial, change rapidly."¹

"Everywhere there was stirring and men's minds were deeply moved to social service," the Census officer for Baroda recorded. The Census officer reported that "there is a good deal of activity amongst these for self-improvement and search after new caste-names to raise themselves in the eyes of their fellows." He wrote of the *mandal* formed by a typical caste, "and an active, and somewhat obstreperous youth league formed amongst them," and how this had "made it hot for their elders to waste money on caste feasts on occasions of marriages and deaths...."²

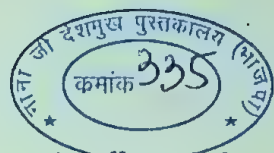
From Bengal, from Madras, from Baroda, the Census officers reported movements towards erasing lines of demarcation between sub-castes and amalgamating castes. So much so that the Madras Report said, "It is probable that the time has come when the elaborate caste detail which has adorned or as some would say congested the past Census reports should be given up." Individual fancy; the desire to amalgamate under an encompassing name – "Yadava"; the urge for "cacophonous combinations" – all compounded the difficulties. With the result, Yeatts wrote, "sorting by caste is one of the most complicated of all Census operations. The tables require a prolonged and careful check, and in the end it is doubtful whether in the famous phrase it is worth while going through so much to get so little."³

Emigration was affecting the estimates in a major way. This presented a problem of its own: variety in nomenclature is present to such a pronounced degree as to shatter any possibility of estimating individual caste contributions to immigration and emigration, the Census officers reported. Moreover, there was a tendency among groups to use alternate "euphemisms." This drove the Census officers to near distraction, Yeatts recorded, "Energy expended in pursuing euphemistic caste synonyms bears a strong resemblance to that involved in hunting a will-o'-the-wisp and is as profitable. Sorting

¹Madras, p. 339.

²Baroda, pp. 409-10.

³Madras, pp. 332-33.



for caste is really worthless unless nomenclature is sufficiently fixed to render the resulting totals close and reliable approximations. Had caste terminology the stability of the religious returns, caste sorting might be worth while. With the fluidity of present applications, it is certainly not. Censuses can deal usefully with facts, not with fashions.”¹

The Baroda Report spoke of a concerted and determined pursuit of consolidation. The “*Vaniar*” has become the representative custodian of commercial interest, it said. The farthest advancement in this direction has been visible in the consolidation of ‘agrarian’ interests under the *Patidar* “which is fast developing into a national caste.”² And so on.

Each of these reports listed a series of factors which were propelling change.

Propellers of change

The reports of province after province listed a host of factors which were accelerating these tendencies – the blurring of boundaries between castes, the diminishing rigour with which caste rules were observed, the diminishing authority of caste organizations that could enforce the rules.

Even for an area like Assam which was much less affected by change, the Census Report thought fit to reproduce an account written earlier about the effects of “the extraordinary economical revolutions taking place in India and all over the world,” about how “it is well known what radical changes in a hill area may be produced by a single bus route, by a handful of Mohammedan traders, by the example of some Hindu workmen...” People were astir all round. Associations were active to raise the status of their group, to get their members to improve their economic position, to agitate for special scholarships and representation in government services. There was a new confidence. Shudras were refusing to carry sweetmeat baskets for Brahmins; they were refusing to carry brides and bridegrooms aloft chairs; they were refusing to carry *palkis*; the “brotherhood of the *bookah*” was being “silently extended to the cleaner and more

¹Madras, p. 336.

²Baroda, p. 411.

educated section of the lower castes," though social recognition of the extension was still in the future; on the other side, high caste men were seeking employment as cooks, clerks, and *gomasthas* in the shops of low caste men...

And there was an all-important new tide – the nationalist movement. "This spirit – the spirit of freedom, of liberty, of being one's own master – has, I consider, developed considerably during the last decade," the Census Superintendent reported. "The *Swaraj* movement and the growing sense of nationalism have directly fostered this feeling and political events have had a profound effect upon social development. A more liberal spirit is abroad – especially among the younger generation – in matters appertaining to caste and, particularly in towns, the bonds of caste have been relaxed to an appreciable extent." Naturally the process of relaxation has been slow, he continued, and it is not that a system that had lasted a thousand years would evaporate so swiftly. But change, there was: the Congressmen do not observe caste rules, he quoted a Professor as reporting, England-returned youth are now readily admitted into society. "Rigours of untouchability are also vanishing due to the liberalizing influences of the time, including frequent railway journeys. A Brahmin would not formerly touch an untouchable, and if he did so accidentally he would purify himself by bathing. Nothing like that is done now-a-days." Students of all castes were living and eating together in hostels...¹

The Report contained a map depicting the communal composition of different parts of the province. Introducing it, the Superintendent remarked, "Had such a map been prepared only forty years ago, it would have been very different from the present map. The green patches (Muslims) in the Assam valley would have been hardly noticeable and the pink hachured sections (Christians belonging to hill tribes) would have been so small that they would have been difficult to find. In 1891, for example, the Muslim percentage of the population of Kamrup was 8.7 per cent, today they form 21.6 per cent of its population; forty years ago the Muslim percentage in the population of Nowgong was 4.1 per cent, today it is 31.6 per cent. As for the Christians, I need only mention that in 1891 the total number of Christians in the Lushai Hills was 15 (probably all Europeans). In 1894

¹Assam, pp. 202, 206-07, 213.

the first missionaries arrived there and half the population of the district is now Christian.”¹ Changes of the same order were being caused by the establishment of tea gardens, the migration of labour from Bihar and other areas.

Migration was loosening rules, it was erasing boundaries: in a typical observation, the Report on Central Provinces and Berar noted the fact of “large depressed communities in various districts who are not regarded as impure when they move into other parts of the country.”²

Better communications; the railway; the motor lorry; education – especially of girls; newspapers and periodicals; the influence of social reformers, and of leaders like Mahatma Gandhi and Jamnalal Bajaj, and their “fiery crusade” against caste; of progressive rulers like the Maharaja of Mysore; political movements and campaigns, especially the participation of women in these; the way those who had suffered imprisonment in political cases were liberated from caste rules; each of these was propelling change, it was hastening the erosion of caste boundaries, the relaxation of caste rules.³

And not just in caste boundaries and rules. To glimpse the change that was afoot, glance at this, a typical passage about the position of women in Bihar, of all places:

The last ten years have seen a marked change in the position occupied by women. The spread of female education is inimical to the perpetuation of the *purdah* system, and there is no doubt that the increasing participation of women in political controversy has accelerated the process of emancipation. There are other influences at work, too. Indians who have been abroad for educational or other purposes and have mingled in a society where both sexes stand on an equal footing return to this country with a new outlook on such matters. On their part and on the part of many of their countrymen who have never left India there is a growing demand for social accomplishments in their brides and a growing impatience with the conventions that stand in the way of their acquisition. One can, however, detect a certain hesitation or lack of enthusiasm – a grudging acquiescence, as it were – in the attitude of the more orthodox towards these modern tendencies. A Muslim correspondent from Orissa writes:

¹*Ibid*, p. 202.

²*Central Provinces and Berar*, p. 387.

³*Central Provinces and Berar*, pp. 352-53, 394; *Jammu and Kashmir*, p. 312; *Mysore*, p. 328.

'A girl of average family tries to live in a more up-to-date way than her antiquarian comrade. The imitation of false show of fashion, though not a healthy sign, is still an advancement nowadays.' And again: 'A record of the names of females as voters in the voters' list, *although they never go to record their votes*, is another healthy sign.' The italics are mine, but one feels that the author would not have it otherwise.¹

Self-improvement movements had commenced among all sections, in particular among the lower castes. Caste associations were pushing reform within their castes even as they were petitioning for favours from Government.²

Official policies of the Government – from the encouragement that was being given for setting up schools open to all sections to the extension of law, and the establishment of police and civil administration and in particular of courts, the institution of elections in *panchayats* – were weakening the hold of caste and the authority of caste *panchayats*.³

Above all, there were the changes that were being wrought by the introduction of machinery, the establishment of factories, the ebb and flow of economic events. Several reports recorded that several of the caste rules had their roots in the unclean-ness of some tasks that had to be performed – scavenging, the rearing of pigs, etc. were often cited. As these had become more hygienic, the very basis of ostracization was being eroded, they noted. The professions were themselves getting more and more splintered, new professions were coming into being so that the old categories no longer fit the new realities.

The Report from the Nizam of Hyderabad's Dominions, spoke of a "caste upheaval". "Besides social and religious upheavals, there are equally powerful economic forces at work, slowly undermining the Hindu caste system," it continued. "The introduction of machinery and labour-saving devices has revolutionized the theory that caste is essentially a functional division on the lines of medieval Western trade guilds. The rigidity with which son followed father's occupation is weakening. Brahmans are turning their hands to agriculture, trade, medicine, law, and almost every other conceivable occupation.

¹*Bihar and Orissa*, p. 270.

²*Mysore*, p. 329; *Baroda*, p. 410.

³*Central Provinces and Berar*, p. 366; *Mysore*, pp. 330-32; *Bombay*, p. 381.

Chamars, Dhers and other kindred castes are giving up their traditional calling and are engaged as labourers in fields and factories, rubbing shoulders with high-caste men. Education and means of communication have played no small part in making the caste system flexible and adaptable. In view of such changing circumstances the enumerators are least competent to discriminate individual castes.”¹ “A return by traditional or general occupations only,” the Superintendent for the Rajputana Agency wrote justifying the caste column in the enumeration, “would be valueless, for traditions are rapidly changing and in these days a Teli may well be a merchant and a Rajput a mill operative....”² The Report for Jammu and Kashmir gave a typical illustration. The Thakkars had been treated as a separate caste in earlier Censuses, it noted. The distinction between them and the Rajputs “was based mainly on occupation and customs, the former taking to agriculture as their main occupation while the latter regarded service as their domain. The Rajputs treated agriculture contemptuously and refused to inter-dine or give their daughters in marriage to Thakkars.” But now, “The traditional occupation having lost its significance in modern times the better minds of the communities awakened to the need for solidification and accomplished the fact.” The Thakkars had completely disappeared as a separate caste from the Census.³

The observations in the Report of a conservative area like Mysore were even more telling. “In regard to occupations, it is doubtful if there was severe restriction at any time,” the Report recorded. “Even now children of artisans, unless they have been sent to undergo higher education, follow the occupation of the father. Nothing however prevents the father holding land and cultivating it and the son going in his wake. Nothing, also, prevents or has ever been understood to prevent a young man of any community receiving education and adopting some other profession.” “An occupational question closely related to caste would arise when a man of what are called the higher castes takes up what are considered as impure trades,” the Report noted. But even in this regard change had commenced. “A Brahmin or Kshatriya would not ordinarily work as

¹ H.E.H. *The Nizam's Dominions (Hyderabad State)*, p. 247.

² *Rajputana Agency*, p. 123.

³ *Jammu and Kashmir*, pp. 312-13.

barber or washerman or boot-maker. Under existing conditions however, these people may supervise establishments where work of this kind is done and sometimes may take a hand in the work itself. The superior men in the caste may dislike the idea of these people working in such occupations but public opinion at present does not consider such persons impure."¹ The Census Report for Bihar and Orissa narrated the effects that the works in Jamshedpur were having: "conditions of life in modern industrial centres are incompatible with a strict observance of caste distinctions," it recorded, and cited the observations of the subdivisional officer who reported that, while inter-caste marriages had not till then increased, "there has been a distinct weakening of caste government and a development of toleration. Many of the castes have abandoned traditional occupations and all classes are found working together in an industrial process, and I am informed that in many cases castes who, in their own village, would avoid each other drink out of the same receptacle and eat in the other's presence." These developments did not imply that the caste system was about to break apart, the Superintendent said, but that there are signs of "greater laxity" even in regard to marriage which were unheard of in the Census Report of 1921.² The Punjab Report drew attention to the effects of urbanization: while inter-caste marriages were still "very limited", "inter-dining has become more widespread." More significant, "The tendency among lower classes to rise in the social scale is obviously on the increase," the Report recorded, "and in towns particularly it is quite easy for a low caste person to claim a higher caste without any fear of detection."³

Nor was it just that new occupations were coming into being; nor just that factories, schools, towns put people adjacent to each other. The effects were compounded by the ebb and flow of modern economic life. "New castes have come into existence from time to time," we read in the Report for Baroda. "Once formed, they appear to be inexorable, but the fact that the formation is possible shows that the system admits of change and is capable of adapting itself to new conditions. Particularly is this the case with the occupational groups,

¹*Mysore*, p. 329.

²*Bihar and Orissa*, p. 266.

³*Punjab*, p. 324.

which still cling tenaciously to their old callings. Where modern conditions have rendered their employments unprofitable, enterprising individuals have drifted away from their present castes to new trades or have taken to the land. Thus are formed new castes, Kadia-Kumbhars, Luhar-Sutars, Sutar-Luhars and Kumbhar-Sutarias...."¹

In 1921, the Census Commissioner for the state recalled, he had wondered whether, in the face of change that was all round, caste would adapt itself and "be content to remain as it were the 'election agent' of the new democracy." "But since then events have moved rapidly," he recorded. His account is worth reading for several reasons: it is typical; it bears testimony to what was afoot; it explodes the kind of hyperbole that we find even in judgments of the Supreme Court – *Indra Sawhney*, for instance – in which judges declaim as if we were still in the time of Manu, in fact in the time in which they think India must have been because something is written in Manu! Here is what the Census Commissioner wrote:

The press of political stimuli together with the general urge of self-expression has released powerful forces which had hitherto been held in leash by the social discipline of elders. We have mentioned the increasing measure of democracy in caste movements. But the institution itself has been undermined mainly in three ways. The pressure of population on the land has driven multitudes of landless manual workers to herd in towns. This has resulted in enforced mixing of all sorts and classes in industrial groups and under factory conditions. Caste restrictions of commensality and exclusive living have been therefore considerably relaxed in towns. Inter-marriage between different castes, 'a wanton practice', as one of my correspondents called it with severe austerity – has hitherto been prevented, but restrictions even here are breaking down through love marriages or illicit unions. Secondly, dissatisfaction with the traditional calling has thrown on the market thousands of men and forced them to take to occupations for which they have had no ancestral bent. Thus the Patidar has become a cooly for unloading of cargo in ports and harbours, while the Brahman has taken to tanning. The Vania has become a motor mechanic, while even the Bhangi has contributed his humble quota to the teaching profession. This tendency has become a potent influence for disintegrating caste restrictions. Thirdly, the desire of inferior orders to claim kinship, and even adopt, the names of higher castes, has become a very powerful movement within recent years. So many have clamoured for

¹*Baroda*, pp. 409-10.

the Rajput name, that it is doubtful whether even high-born Rajputs can now much enthuse over their own traditions. The incursion of Valands, Sutars, Sonars and Luhars into the exclusive Brahman fold can only result in a *reductio ad absurdum* of the caste system and of its immemorial dignity, 'just as the creation of a large number of peers must inevitably reduce the prestige of the House of Lords.' (G.T. Garratt, *An Indian Commentary*, page 20.) If these disintegrating influences become still more powerful in the future, as it is inevitable that they will, castes will no longer be the mainspring of the Indian party system. In themselves they will be no more inimical to national fusion than are trade unions. They will simply help to resolve, by adapting new political institutions, Indian society into horizontal divisions, rather more rigid perhaps in the beginning than their prototypes in modern European countries. Judged in that view, the development of caste is decidedly in the direction of nationality, while its anti-social features are being overthrown, or at least controlled, by a genuine movement in social service, literature and art throughout Hinduism, giving definite evidence of its '... ability to rise to the heights which the new political forms will demand. In recent years, the cry 'Back to Hinduism' has not meant a return to the old *dolce far niente*; it has meant the extraction from Hinduism of powers latent in it but hitherto dormant. It is the demand for Hinduism to stand on its own legs, the demand for action and positive service. The wonderful results that have already shown themselves in the very short period of active Hindu nationalism lead one to hope that, with the attainment of a self-reliant manhood, Hinduism may have many more good things to give.' (R.N. Gilchrist, *Indian Nationality*, page 137.)¹

And there were the ever-effective poles to vault over restrictions: wealth, power, the proximity to power. The increased fluidity in economic affairs brought wealth to ever-newer individuals and groups. Talking of the increasing instances of marriages between sub-castes, the correspondent from Orissa wrote to the Census Superintendent, "Money works in these cases as a mighty leveller of sub-castes. If a member of the lower sub-caste acquires money, power or authority, he marries into the immediately higher sub-caste and gradually becomes amalgamated into it." He proceeded to give instances of sub-castes which were getting amalgamated upwards in this way, and observed, "This is not due to any relaxing of the rules of inter-marriage or commensality. These rules are as hard and

¹Baroda, p. 412.

inexorable as ever; but, as social rules have lost their sanction and their binding force, people never fear or scruple to violate them whenever it suits them to do so. The man of power and pelf can shut the mouth of the caste people with gold and break the social rules with impunity.”¹

The changes ran so deep, they were so pervasive that, while the official position remained that caste enumeration had to be done as caste was still a factor of great significance in Indian social life; that such enumeration even had its uses – it helped focus the attention of governments, of caste leaders on things that needed to be done for those who were backward; that, while there were difficulties, the returns were in the large reliable, several of the Census officials wrote that enumeration by caste should be given up, that in any case the elaborate detail in which the data was being tabulated should be abandoned. In addition to all the factors that have been mentioned was the increasing tendency of individuals and groups to adopt and devise caste names that caught their fancy. Several of them manufacture “cacophonous combinations”, Yeatts wrote from Madras. As a result, he said, as we noted, “Sorting by caste is one of the most complicated of all Census operations....”² The Assam Superintendent was more explicit: “The returns of caste are undoubtedly getting less accurate at each successive Census and it seems extremely doubtful whether it is worthwhile collecting and publishing statistics for any castes except for those which are known to be likely to be accurate.” Giving examples, he wrote that there was no difficulty in collecting figures for Ahoms, “but when it comes to castes like the Kayasthas, Mahisays, and Patnis I confess that the figures appear to me to be worthless and not worth the trouble of collecting.”³

That is what officers in charge of enumeration the last time there was a caste-wise count recorded, and yet today, we have the assertions – that caste “X” accounts for “Y” per cent of the population in district “Z”; that “X” is an OBC while “Y” is...; even that caste “X” voted for the Congress and “Y” inclined towards the Samajwadi Party in the U.P. municipal elections... To recapitulate:

¹*Bihar and Orissa*, pp. 266-67.

²*Madras*, pp. 332-33.

³*Assam*, pp. 202-03.

- ❑ There has been no caste-wise enumeration since the Census of 1931;
- ❑ In that Census, officer after officer wrote extensive accounts of the fluidity that had come to mark the caste system – how the lines between castes were getting blurred, how caste rules were getting to be disregarded, how the new economic and technological developments were upsetting the very basis of caste divisions;
- ❑ Since then, each of the factors that were propelling the changes has got accelerated manifold, and many new factors have entered to spin the whirl even faster;
- ❑ By contrast, journalists and pollsters declaim with such confidence, “Our Exit Poll shows that Kurmis have deserted Congress and are flocking to.....” Not just politicians, even judges talk as if India is what it was, in fact what some text collated over 700 years says it should have been twenty-five hundred years ago.

India?

In *Indra Sawhney*, Justice B.P. Jeevan Reddy maintains that the “caste-occupation-poverty” nexus remains intact in the country. That someone who was born into the caste of barbers may become a washerman “would indeed be a rarity,” he says, “it is simply not done.” “There may be exceptions here and there,” he allows, “but we are concerned with the generality of the scene and not with exceptions or aberrations.” Again, there may have been “some dilution” of the nexus in some urban areas, but in rural areas “it is strikingly apparent,” he insists, and “since rural India and rural population is still the overwhelmingly predominant fact of life in India, the reality remains.”¹

First, over 25 per cent of our population already lives in urban areas. Second, look just at the physical mobility of Indians today – we make five *billion* journeys just by rail every year; yes, five *billion*, five *times* our total number: can it be that even as a person violates what were supposed to be caste rules about eating, about drinking water, of touching and being touched by, can it be that even though he violates these throughout these journeys, there is no residual effect upon his life? Can it be that the millions who migrate to other places

¹*Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 714-15, para 779.

– to Punjab from Bihar, for instance – for work, return unchanged? But, more significant, the manner in which even “traditional occupations” are conducted has undergone sea-change: a person may still be a farmer, but the zeal with which he has been adopting new varieties of seeds; the way he has been teaming up with others to demand and wrest more power and water for his fields; the new avenues he has found for marketing his crop; the way he has been throwing governments into office and out, can it be that, even though he is, in Justice Reddy’s prism, still doing his traditional occupation, he is the same man, caught in the old, unchanging “caste-occupation-poverty” nexus?

You will notice a telling disconnect here. The ones who insist on such notions – an unchanging India in which people are mired in unchanging nexuses – are the very ones who, with that smattering of Marxism, will recite how social relationships are governed by the “mode of production”. Yet, while throughout the length and breadth of the country, that “mode of production” has changed to an enormous extent, and is changing at an ever-faster pace, they insist that social relationships and social conduct remain mired in the ditch of the past, indeed in the ditch of what *they* insist the past was!

And the lengths to which they will go to maintain that “the reality remains.” In *Indra Sawhney* itself, a judgment written in 1992/93, Justice Ratnavel Pandian pictures India as follows:

...In this (Tinnevely) district there is a class of unseeables called *purada vannas*. They are not allowed to come out during day time because their sight is considered to be pollution. Some of these people who wash the clothes of other exterior castes working between midnight and day-break, were with difficulty persuaded to leave their houses to interview. [*sic*.]¹

The Judge is moved. “Does not the very mention of the caste named ‘*purada vannas*’ indicate that the people belonging to that community were so backward, both socially, economically as well as educationally beyond comprehension?” [*sic*.] “Would the children of those people who were not allowed to come out during day time have gone to any school?” the Judge demands. “Does not the very fact that those people were treated with contempt and disgrace as if they were

¹*Indra Sawhney*, *op. cit.*, at 389, para 102.

vermin in the human form freeze our blood? Alas! What a terrible and traumatic experience for them living in their hideouts having occasional potluck [*sic.*] under pangs of misery, all through mourning over their perilous predicament on account of this social ostracism. When people placed at the base level in the hierarchical caste system are living like mutes, licking their wounds – caused by the deadening weight of social customs and mourning over their fate for having been born in lower castes – can it be said by any stretch of imagination that caste can never be the primary criterion in identifying the social, economic and educational backwardness?...”¹

Firstly, assume the description to have been true: it certainly does not reflect “the reality” of India – not of the Punjab from which I come, not of Nagaland or Assam or of Bengal where caste has never had much of a presence, not of... In *every country*, and *at all times* we will find such idiocies. Such an extreme aberration said to exist in one corner is presented as if it correctly portrays the “reality” of India as a whole. On the other side, the enormous changes in occupations, the mobility – physical, social, economic; the earthquakes those very millions who are said to be hide-bound wreak by overthrowing their rulers, all that is dismissed as exception, indeed as “aberration”.

Second, from where does Justice Pandian get that “evidence”? From the Mandal Commission’s Report. And from where does that Commission get the “evidence”? From a book, *Rise and Awakening of Depressed Classes in India*, by an author Justice Pandian describes as “the noted and renowned sociologist.” And what source does that renowned author cite for the fact? A cutting from *The Hindu*. Of what date? Of 24 December, 1932! And we must believe that this represents the reality of the whole of India today! Indeed, to such an extent does it represent reality that it must form the basis for State policy today. To such an extent must it determine State policy that the clear and emphatic command of the Constitution, that caste be shunned, must be disregarded!

There is another aspect of such assertions that has far-reaching operational consequences. The sentences that follow Justice Pandian’s mourning exhibit it. “Can it be said,” he says in justification of his prescription, namely that backwardness must be identified

¹ *Ibid*, at 389, para 103.

by looking at the person's or group's caste, "that the propagation and practice on the caste-based discrimination, the marked dividing line between upper caste Hindus and Shudras, and the practice of untouchability in spite of the Constitutional declaration of abolition of untouchability under Article 17 *are completely eradicated and erased?* Can it be said that the social backwardness has *no* relation to caste status?"¹ In a word, the test is *complete eradication and erasure*, the test is that caste should have *no* bearing on social status. And the evidence is a cutting from *The Hindu* of 1932!

"...The Indian society has, for ages, remained stratified," Justice Sawant writes, "... it consists of mobility-tight hierarchical social compartments. Every individual is born in and, therefore, with a particular caste which he cannot change..."² A moneyed smuggler has a higher standing in society, in politics than the greatest Vedic scholar; people bow and scrape before a Minister – be he just the Minister of the moment – more than they do before the most chivalrous warrior; do they go by the caste of that smuggler or Minister or by the possibility – howsoever remote! – that they can get more out of these fellows than they can out of that scholar or warrior?

After the usual cliché-ridden "history" of the nature and evolution of our society, Justice Sawant concludes with the righteousness customary of such pronouncements, "The concentration of the executive power in the hands of the select social groups had its natural consequences. The most invidious and self-perpetuating consequence was the stranglehold of a few high castes over the administration of the country from the lower to the higher rungs, to the deliberate exclusion of others. Consequently, all aspects of life were controlled, directed and regulated mostly to suit the sectional interests of a small section of the society which numerically did not exceed 10% of the total population of the country."

It is a measure of the extent to which we have internalized such clichés that no one would even think of asking for, and the Judge would not even think of pointing to any empirical basis for these assertions. As this was all, on the Judge's telling, a result of Hinduism,

¹*Indra Sawhney, op. cit.*, at 390, para 104.

²*Ibid*, at 502, para 399.

did this state of affairs continue through *the thousand years* of Islamic rule? Was it in the interest of the Islamic rulers also to administer the kingdom in such a way that only these upper castes benefited? If so, why? There is no answer, of course.

But I am on the sentences that follow, for, while the Judge's diagnosis merely reinforces self-debasement, these lead us to the policy prescription that these progressive judges advance: "The state of the health of the nation was viewed through their eyes [that is, the eyes of the high-caste rulers and controllers], and the improvement in its health was affected according to their prescription" – this presumably throughout the thousand years of Islamic rule also, throughout the rule of the British also, both sets of rulers having gone the last centimeter to crush the priestly and warrior castes in particular, and with particular savagery as they saw that these were the castes that would constitute a challenge to their rule, that they were the impediment not just to the spread and consolidation of political power but to the spread of their religion also. Why is it that throughout these thousand years too, "The state of the health of the nation was viewed through their eyes, and the improvement in its health was affected according to their prescription"?

The Judge continues,

It is naïve to believe that the administration was carried out impartially, that the sectional interests were subordinated to the interests of the country and that justice was done to those who were outside the ruling fold.

Precisely. Who were the ones who were thrown out of the "ruling fold"? Were the sectional interests of the new rulers not advanced by fomenting distance and animosity among sections of the community?

But that is not all. The Judge concludes his little survey of India's political and social history with a triumphant declaration:

*This state of affairs continues even till this day.*¹

A glimpse into what happened

When judges decide to leaven their decisions with sociology and history, should they not acquaint themselves with primary

¹*Indra Sawhney, op. cit.*, at 503, paras 398-400.

sources? Should they not take the trouble of assessing evidence? To take just one example, in his important work, *Growth of Scheduled Castes and Tribes in Medieval India*, Dr. K.S. Lal makes a telling point.¹ The Islamic invaders prevailed because of the weakness of the Indian State system – in particular, the organization, equipment, training, tactics of our military forces. After that defeat, Islamic rule prevailed for a thousand years. It was oppressive in the extreme – rights remained only for those who embraced Islam and accepted the rulers, and even then were subject to the predilections and idiosyncrasies of rulers, the vagaries of campaigns and the rise and fall of dynasties. Yet India did not become like the countries from Syria to Afghanistan, countries that converted wholesale to Islam, Lal points out. Had the Indian social system been as oppressive as these judgments make it out to be, the State-system having given way, millions would have embraced Islam.

The contrary happened. By the time Islamic invasions entered the interior of the country, the traditional warriors – Rajputs and the rest – had exhausted themselves in internecine warfare, and in the dogged struggle they waged against the invaders during the first few centuries. From the accounts of Muslim chroniclers and official histories, K.S. Lal documents in detail that thereafter and right to the end of Islamic rule, far from welcoming Islamic conquerors as liberators, the “lower castes” and “tribes” – Jat, Mina, Meo, Bachgoti, Baghela, Tomar, Barwaris, Gonds, Bhils, Satnamis, Marathas, Oraons, “Shudras”, Gujars, Kunbis – are the ones that put up the most determined resistance to the invaders.

And there was much vertical mobility in the social set up – persons and groups “rose” into and “fell” from one caste into another. How we forget! Chatrapati Shivaji was nominally from a “lower” caste: Maratha. The fist of his army was from two “low castes”, Maratha and “Kunbi”. Would anyone grudge him or his valiant soldiers the most exalted status – by caste or adoration? Similarly, groups ascended to higher status by the valour and other attributes that they exhibited.²

¹K.S. Lal, *Growth of Scheduled Castes and Tribes in Medieval India*, Aditya Prakashan, New Delhi, 1995. For related material, see also his, *The Legacy of Muslim Rule in India*, Aditya Prakashan, 1992, and *Muslim Slave System in Medieval India*, Aditya Prakashan, 1994.

²*Ibid*, pp. 120-25.

The savagery itself of the invaders would have been enough to make people flee as far as possible: twenty lakh are estimated to have been killed in the invasion of Mahmud Ghaznavi alone. But there was another reason. The groups that fought the invaders had to take refuge in inaccessible forests and mountains, they had to flee to ravines like those of Chambal. The alternatives were manifest: being butchered; being captured and deported to Afghanistan and beyond to be sold as slaves; being taken as slaves within India; abandoning their religion and embracing Islam. Others took refuge in the forests and mountains to escape the extortionate exactions of the Islamic rulers: successive rulers appropriated anywhere from half to three-quarters of the produce from farmers. Indeed, the operating rule, stated in so many words, from the Khiljis to Aurangzebe, was to leave in the hands of farmers no more than was absolutely necessary for subsistence of the farmers and seeds. On occasion, the collectors took more than the entire yield in a year; that is, even what was left over from the previous year's crop was confiscated. The Islamic chroniclers and European travellers themselves furnish accounts of peasants having to sell their wives and children to meet the exactions of the collectors. The only escape was to flee to the forests.

Again, Muslim chroniclers themselves attest that life in those inaccessible forests was "very hard", and these people were reduced to "living like wild beasts" – living off roots and leaves and such fruit as they could find. This cruel cycle – of resistance, flight to forests, the sub-human existence there, forays to harass and beat back the conquerors, flight back into the forests – lasted a thousand years. That is how several of these groups lost their high civilization: Lal gives accounts of Muslim historians and chroniclers – accounts triumphant for them, heartbreaking for us – about the high civilization and the great wealth that the Gonds, for instance, had attained; and how, as a result of the resistance they put up to Muslim rule, they were reduced to penury and backwardness, how they had to flee to the forests so that today they are counted among "tribals" and "backwards".

The ubiquity of such groups arises from two factors. First, resistance was offered by groups all over the country, it was offered throughout the thousand years. Second, and that is difficult for us to imagine today, forests were everywhere: Dr. Lal recalls Ibn Battuta writing of rhinoceroses in the jungles of Allahabad; he cites Abul Fazl

reporting how Akbar hunted leopards 30/40 kms. from Agra; he cites Barani's account of Mewatis leading forays against Balban and his Kingdom from jungles to the immediate south-west of Delhi....

These are the phenomena that account for the enormous increase in the number of those whom we today know of as Scheduled Castes and Tribes. Hardly any Muslim chronicler and historian of the period asserts that the "lower castes" were embracing Islam because some high caste was oppressing them. On the contrary, several of them record how different castes lived together, and peaceably. One after the other among them pours special venom on the "lower castes" for being the most determined resisters to the spread of Islam. All this is evident from the memoirs of the Emperors themselves, from the accounts of Islamic historians themselves. Yet, our judges repeat the clichés.

Nor is it the case that Islam enabled those who converted to enter some egalitarian utopia. Quite the contrary. And we do not have to look farther than the judgments themselves. What is the "reason" these very judgments give for extending reservations to Muslims, for instance? What is the reason they give for overturning so central a theme of the Constitution and its makers – that such concessions shall not be given along communal faultlines? The "reason" the judges give is that castes continue among Muslims to this day. Is this also because of Hinduism? Or because, as K.S. Lal shows, Islamic rule never aimed to, nor did it in fact, catapult people into some egalitarian utopia?

True, judges are concerned with law. Their job is not to write treatises on history. Precisely. All the more reason that, when they decide to "substantiate" their findings and policy prescriptions by assertions about our history and society, they must do more than repeat clichés.

The other side of the coin is equally important. Before using hyperbolic pejoratives to describe how oppressive Indian society has been for "thousands of years", and basing the most far-reaching policy prescriptions on that construction, should the judges, who quote a sentence or two from *Manusmṛiti*, not adduce evidence to establish, first, that the half a dozen verses that are cited again and again are representative of the work; second, that the *smṛtis* are intrinsic to Hinduism; third, that the kind of oppression and differentiation that these verses imply actually prevailed in practice?

Manusmṛti is said to have been compiled over seven to eight hundred years. Which verse is authentic and which, an interpolation? Second, what is the evidence that this text was in fact being lived out in practice? Even the “eminent historians” who have built their careers on such assertions have not been able to point to any evidence that even vaguely suggests that Indian society was characterized by the tales of caste oppression that are their stock-in-trade.¹ With these “historians” unable to adduce any evidence to substantiate their assertions, on what do the judges base their characterizations? And yet, not only do our judges repeat the assertions, they do so in grandiloquent prose, and they base their policy prescriptions on those very assertions. Third, is any text that prescribes differentiation in tune with the central doctrine of the religion? The central doctrine embodied in the *mahāvākyas*: *aham brahmasmi, tat tvam asi sarvamidam khalu brahman...*? When each being has a soul; when that soul is common to all; when the soul is the same as the immanent-transcendent reality that pervades the universe, how is any text that ordains differentiation in harmony with the religion?

Again, I am not for a moment suggesting that dissection of religious and philosophical texts is the proper province of judges and courts. They invite the charge precisely because they, in fact, make assertions about these texts, because they snatch a sentence or two from these texts, because they base their prescriptions on that snatching.

“But look at marriage,” the reservationists argue. “People still marry only within their caste. That shows that change is just on the surface. Where it matters, caste rules.” Look at the Germans, say, look at the Japanese, the Chinese. Tabulate data about their marriages. Is it not the case that, “The overwhelming proportion of Germans, of Japanese, of Chinese marry other Germans, Japanese, Chinese respectively”? In any case, as Justice Sahai says in *Indra Sawhney*, this trait of a community has no relevance to public employment.²

¹C.f., Shashi S. Sharma, *Imagined Manuwad, The Dharmasastras and their Interpreters*, Rupa, Delhi, 2005. For evidence of the hollowness of their assertions in their own words, see, for instance, my *Eminent Historians, Their technology, their line, their fraud*, ASA, New Delhi, 1998.

²*Indra Sawhney, op. cit.*, at 611, para 603.

The race then, and the one now

There was another trend, and so prominent was it that the Census Report of every single province highlighted it. Among the lower castes, there was a race to get recognized as a higher caste. Caste after caste was shedding practices that were associated with the lower position. Caste after caste was adopting, and making sure that all concerned noticed that it had adopted practices – even those that were retrograde – of the higher castes. Caste after caste was using the Census enumeration as an occasion to advance its claim to higher status.

In which direction is the race headed today? How do the following observations of the Census officials compare with what has been wrought by reservations and the politics of reservations?

Even in the Census Report for 1921, the Census Commissioner had observed that, given the importance that caste had in determining a person's civil condition, it had been difficult for the people "to appreciate that the object of the inquiry was merely to ascertain the numbers of each caste; and the ancient tradition that the King or the Government was the ultimate authority in determining questions of caste probably helped the popular feeling that the effect of the Census record, so far as the individual was concerned, would be to fix his particular position in the social scale. The opportunity of the Census was therefore seized by all but the highest castes to press for recognition of social claims and to secure, if possible, a step upwards in the social ladder." A new factor had given impetus to these efforts: caste *sabhas* had begun to be formed, and the *sabhas* were now petitioning the Government. By 1921, the movement to organize castes had made much progress, and so the number of representations had multiplied, and the insistence with which they were urged had intensified.¹

¹*Census of India, 1921, Volume I, Part I, op. cit., p. 223.*

Reporting on the 1931 returns for United Provinces, the Superintendent of Census Operations, A.C. Turner, remarked that while in earlier Censuses representations had come mainly from individuals, "Since 1921 the *sabha* movement has developed to such an extent that all save the most backward castes and tribes now have more or less well-organised societies, who bombarded me until long after the tables were printed with requests for new caste names." He proceeded to list the claims that had been advanced by different castes to this effect: the list covered three full sides of the foolscap pages of the Census Report and contained names of sixty-three castes and the claims they had advanced. In every single instance, the claim was that the caste deserved to be enumerated as a *higher* caste – Ahar as Yadava, as Yadava Kshatriya; Aheria as Hara Rajput; Ahir as Kshatiryas of varied superscripts; Banjaras as Chauhan and Rathor Rajput; Barhai as Dhiman Brahman, as Panchal Brahman, as Vishwakarma Brahman; Bawaria as Brahman, period; Bhotia as Rajput;... Chamar as Jatav Rajput;... Gadaria as Pali Rajput; Gujar as Kshatriya;... Jat as Jaduvanshi Thakur;... Kayastha as Chitraguptavanshi Kayastha, as Kshatriya;... Lodh as Lodhi Rajput;... Nai as Nai Brahman, as Pande Brahman;... Patwa as Brahman;... Taga as Tyagi Brahman.... One after the other, sixty three castes, the list alone taking three full pages... The point here is that *each* of them was aspiring to be and demanding to be elevated to a *higher* place in the social hierarchy.¹

"Hindu caste claims provided as plentiful a crop as usual and amongst the perennial contentions there also appeared a number of new varieties not previously exhibited in any Census," wrote A.E. Porter, the Superintendent of Census Operations in Bengal and Sikkim. "All were as usual to some name implying a superior position in the Hindu hierarchy of social groups." And each group was backing its claims by arguments that were in many ways touching: "In some cases, the *varna* claimed is alleged to be that of the caste concerned merely because in one of the *shastras* the name or function of the caste appears within that *varna*. In other cases, a somewhat similar name is seized upon in the holy books and the existing name of the caste is derived by fanciful etymology as a corruption of the original

¹ *United Provinces of Agra and Oudh*, pp. 528-32.

name, whilst a myth or theory, generally supported by no historical research or evidence, is put forward to explain the fact that the caste (given a respectable affiliation in the *shastras*) finds itself now struggling against a degraded position in the heretical non-Aryan land of Bengal..." And each claim was fortified by statements from *pandits*... Even in allocating castes as between *shudras* and the rest, there was a difficulty, Porter recorded: neither the caste nor the strict differentiation existed "at all in earlier times when the caste rules were not rigid but arose only after a degree of exclusiveness had been introduced into the caste groups which was not contemplated in the scriptures themselves by reference to which it is now sought to reach a decision...." The Census recorded the list of claims and claimants – of forty-four castes, each for upgradation: Baidya to Baidya Brahman;... Chamar to Satnami;... Gop to Yadava;... Kayastha to Kshatriya;... Koiri to Koiri Kshatriya;... Kurmi to Kurmi Kshatriya;... Sutradhar to Vishwakarma Brahman;... Yugi to Rajbangshi;... Rajbangshi to Kshatriya;... Yugi to Yogi; Vaidik Baishnab to Satvata Brahman.¹

Every Census officer was confronted with the charge that by asking people to state their caste, the Census was perpetuating a system that had come to contain much evil and ought to be scotched. But caste has been there long before the Censuses started, they pointed out. The evils have little to do with the Census. The job of the Census is to portray things as they are, not the way they should be. Moreover, look at the fervour with which people, especially of the lower castes, look to the Census as an opportunity to improve their status, they pointed out. Does this not show that caste *is* important; that people do not object to being asked their caste; that, in fact, those most in need, look upon it as an occasion to improve their lot? The arguments could easily be turned around: the very fact that they looked upon the Census as a useful occasion to get themselves registered in a higher slot showed that enumeration by caste in fact perpetuates that identity, etc. But for the moment, the point that is relevant is the direction the representations were taking. "The feature of interest," A.H. Dracu and H.T. Sorley, the Census Superintendents for the Bombay Presidency, pointed out, "is that *the claim is always for a*

¹ *Bengal and Sikkim*, pp. 425-28.

more dignified title, for admission to a higher caste or exclusion from a caste which is considered low in the social scale and is rarely based on any argument of obscurity or any inaccuracy in the form of description adopted." Sainis and Malis wanted to be classified as Saini Rajputs; Gabits as Marathas; Bedas as Naiks; Blacksmiths as Panch Brahmans; Barias as Kshatriyas; Talpadas as Padhiar Rajputs; Devalis and Bhavins as Naik Marathas; Beldars as Kumavat Kshatriyas; Lingayats as Lingi Brahmans; Kirars as Maheshwaris....¹

"The entry of caste in the Census schedules is, in fact, the one entry which gives rise to difficulty at the time of the Census and is invariably the subject of a large number of memorials submitted by members of various castes to the Local Government, to District Officers and to the Superintendent of Census," C.S. Mullan recorded in the case of Assam. He drew attention to the "most mysterious fashion" in which, in each successive Census, the numbers of Patnis, a caste that had been agitating for a new name that would upgrade it, had been "melting away". "Far be it from me to re-open on this occasion or even refer to the old feuds which still exist among various sections of the Hindu community regarding their claim to a more exalted origin than would ordinarily be admitted by their social superiors. All I need say is that the old tendency to use the Census as an opportunity to press for recognition of social claims was just as pronounced at this Census as in 1921." Napit were memorializing Government to be rechristened, "Nai Brahman"; Namsudra were asking to be renamed "Nam-Brahman"...²

One Census report after another exclaimed that people had come to regard the Census Office "as a sort of College of Heralds", that they had transferred to it the ancient prerogative of Kings to recognize them as part of one caste or another. "At the 1931 Census this crop was rather richer than usual," W.H. Shoobert, the Superintendent for Central Provinces and Berar, remarked. "Many of the applications aimed high," he observed, and gave a selection of the claimants and their claims: Nai to Kulin Brahman; Bhat to Brahm Bhat Brahman; Panchal to Vishwa Brahman; Vidura to Parashar Brahman; Lunia to Lunia Kshatriya; Mahar to Kashyap Rajput; Gond to Kshatriya Surajwansi; Chamar to Satnami... "The foregoing catalogue shows

¹Bombay, pp. 382, 398-99.

²Assam, p. 203.

that several castes which had hitherto been classified as untouchable claimed Rajput origin," Shoobert noted. He drew attention to transmutation of beliefs too. The Chamars have asked for recognition as "Satnamis" by caste, he pointed out, adding, "This is an example of the genesis of a caste whose origin is based entirely on the religion of its members. The Satnamis are in fact a religious sect but as the local Government had in 1926 decided that Satnamis should be shown as a separate group in the next Census returns, the classification had to be accepted. It is interesting however to recall that one of the original doctrines of the Satnami religion was to deny the supremacy of Brahmans and to deny the distinctions of caste" – an observation that shows several things simultaneously: the effect of a governmental decision in fomenting claims; the transmutation of a doctrine; the usefulness of even such a category in enabling a lower group to raise itself in the eyes of others and in its own eyes.¹

In the Rajputana Agency states, the memorials were fewer, the Census office remarked, than in British India "for in the former any undue precocity for social recognition outside an accepted sphere would be severely dealt with as it was in England up to the end of the nineteenth century." Even so, several caste *sabbhas* had sent representations – each memorial was for recognition into a higher nomenclature: Daroga as Rawana Rajput; Nai as Kuleen Brahman; Sevag, Rankawat and Bhojak as Brahman; Khati or Sutar as Jangida Brahman; Mali as Sainik Kshatriya; Kurmi or Kunbi as Kurmi Kshatriya...² What a far cry from our day when the Jats of Rajasthan have at last *won*, and got themselves listed as a *backward* caste!

The Report for Jammu and Kashmir also listed the claims of a number of castes, including the ones very low down in the scale, to be recognized by a higher appellation, "the aim in each case being to shoot as high as possible." Nayees as Nayee Brahmans; Bhats as Bhat Brahmans; Jhewars as Kashyap Rajputs; Kurmis as Kurmi Kshatriyas; Chippi, Darzi, Chapegar as Rohela Tank Kshatriyas; Lodhis as Lodhi Rajputs; Chamars as Chandarbansi Rajputs...³

The list for Baroda, modern Gujarat, covered two pages: Anjana Kanbi to Rajput; Dhed to Vankar; Baria to Rajput; Kaliparaj to

¹ *Central Provinces and Berar*, pp. 353-54.

² *Rajputana Agency*, p. 123.

³ *Jammu and Kashmir*, pp. 310-12.

Raniparaj; Kanbi to Patidar; Luhar to Panchal Brahman; Mahar to Mayavanshi Rajput; Sonar to Daivadnya Brahmans; Sutar to Vishwakarma... Again, in one and every case, the memorial was for recognition to a more honorific station.¹ And we will just come to what a judge of the Supreme Court has to say about what the policy of reservations has pushed the people of modern Gujarat to demand today.

In Bihar and Orissa, the Babhans demanded that they be enumerated as Bhumihar Brahmans; the Barhis and Kamar/Lohars as Vishwakarma Brahmans; the Hajams and Nais as Nai or Kulin Brahmans; the Baraiks as Jadubansi Kshatriyas; the Dosadhs as Gahlot Kshatriyas;... the Julahas as Sheikhs and Sheikh Momins... The claims had been "pertinaciously advanced", W.G. Lacey, the Census Superintendent remarked. "The list is not exhaustive," he cautioned, and gave an illustration: "It makes no mention, for instance, of the Pasis, whose unrivalled proficiency in tree-climbing is said to have encouraged them to claim a title meaning 'the Brahmans who go up in the air'." "It will be seen that, so far as the Hindu castes are concerned, the general desire is to be recognized as Brahmans or Rajputs in some form or other...." Lacey went on to explain how the numbers got affected not just by claims, not just by the statements of individuals, not just by the campaigns of caste organizations but in addition by the predilections of enumerators....²

The 1911 Census had attempted to tabulate castes on the basis of social precedence, Khan Ahmad Hasan Khan, the Superintendent for Punjab recalled. "This attempt could not be expected to succeed in view of the fact that nearly all castes consider themselves to be most exclusive and high-born" – and what would several of them claim today? Nais urged that they be counted as Brahmans or Rajputs; Mirasis claimed they were really Qureshis; the Lohars and Tarkhans claimed they were Dhiman Brahmans.... "Thus," Khan noted, "on the present occasion more than ever before a tendency was noticeable in various localities, particularly among the occupational castes, to return a higher caste." And he had discovered a special reason behind the demands of some of them: "One of the main reasons was a desire

¹ *Baroda*, pp. 394-96.

² *Bihar and Orissa*, pp. 263-64.

to be included in one of the agricultural tribes, such as Jat or Rajput, and thus to secure exemption from the provisions of the Punjab Alienation of Land Act."¹ Another tiny reminder that a governmental policy or programme or law has but to be designed in a particular way and it ignites a particular type of conduct.

Under the section entitled "Caste upheaval", the Census Commissioner of the Nizam's Dominions, remarked, "During the few months preceding Census enumeration I was overwhelmed with memorials from various communal and caste associations...." The memorials had followed the same pattern, they reflected the same premise – that the Census Office was "a herald's college"; they expressed the same aspiration – to be anointed as a higher caste.²

"It is curious what great trouble leaders of several communities are prepared to take to prove their title to a new name," the Superintendent for Mysore remarked. "Texts are quoted from various scriptures, extracts brought out from *Sannads* and *Kharithas*, and records of old discussions, relevant and irrelevant, copiously referred to. There seems to be a feeling in these cases that the associations that go with the old name are unpleasant. Sometimes the community feels that it really has a status in society which is denied in the old name. By the use of the new name such communities wish to regain lost position or divest themselves of unpleasant associations." Contrast this route with the insistence today that "Scheduled Caste" and, of course, "*Harijan*" be *not* used, and instead the members of these groups be called "*Dalits*" – ones who are crushed.

There were two sides to these demands, the Superintendent observed. "As indicating rising self-respect among the communities these attempts should be wholly welcomed. It is good that every community should feel that its status is high and desire to live worthily of that status. If by adopting a new name the level of life in the community is likely to rise, there ought not to be any opposition to the new name." In other instances, he noted, the attempt was "pathetic" – as the leaders who exerted so hard to elevate the name did little to raise the level of life of the community...³

¹*Punjab*, pp. 322-24.

²*H.E.H. The Nizam's Dominions*, p. 246.

³*Mysore*, pp. 315-19.

Violent fluctuations

One consequence of these demands and their acceptance was that the numbers under different castes fluctuated, Report upon Report recorded, "violently". The Census Commissioners and Superintendents remarked on these fluctuations with a mixture of amusement – for the fluctuations reflected the social system of the people who had been put in their charge – and exasperation – for they affected the reliability of the figures, of figures that our reservationists take as cast in scripture.

"A glance at the figures," Yeatts wrote comparing five successive Censuses, "shows that pronounced or even wild oscillation is almost the rule, its violence far transcending any possible effects of normal forces." It isn't just that the figures were swinging this way and that. "Indeed, this table shows up vividly *the uselessness of caste enumeration*. When caste names are shed like garments there is little point in an enumeration which must perforce go by name. The sole value of this table is in its illustration of the fluidity of caste nomenclature and the meager value attachable to the individual caste totals."¹ And yet for the reservationists today, the figures are gospel.

The Ambattans reflected the "wildest variation of all," Yeatts recorded: they were 227,000; they have become 10,000 – flown to other castes! The precipitate decline in the number Gollas is to be explained by the swelling in the number of Yadavas. The rise of Kalingi "represents probably the fall in Kalinji.... The missing Kallans and Maravans are probably for the most part concealed below some recondite honorific and the Mangalas' fall is due to the same reason as has practically wiped out Ambattan. Vaniyans are half their 1921 figure... The Telugu washermen show a steady increase but at a rate much below that of the region they chiefly favour. Their Tamil co-professionals show a fall of 20 per cent. In both cases the probable explanation is in some fancy name that has obscured the facts..." Yeatts' amusement at this liberating effect of the Census continued: the Chakkiliyan seems content, he noted; however, "his fellow leather worker of the north has not escaped the contagion, for Madigas have diminished apparently 16 per cent. More pronounced decline

¹Madras, p. 334.

however is apparent in their hereditary enemies, the Malas, who have shed a million, while in the south the Paraiyans have dropped 1¼ millions and the Totis have practically disappeared..."¹

Shoobert gave similar instances in his elaborate Report on demographic developments in the Central Provinces and Berar. "Kunbis have for the last ten years shown a growing tendency to call themselves Marathas," he wrote, explaining the "noticeably low" growth in their numbers. "There is absolutely no reason to suspect that this yeoman caste is not increasing proportionately to the rest of the population and the rise of 370 per cent since 1901 in the number of Marathas clearly proves what has happened." In other cases too the same phenomenon was evident: "The rise of 82 per cent in the number of Mhalis, the barber caste of the Maratha plain, more than accounts for the very limited increase among the Nais with whom they were probably confused at earlier Censuses," Shoobert explained.²

The position was no different in other jurisdictions – we have already noticed, for instance, "the most mysterious fashion" in which some communities were melting away in Assam.

With reservations expanding by the year, the reader need hardly ascertain that each and every one of these castes whose *sabbas* had then successfully agitated to be included into a caste higher in the social scale has, since, successfully agitated to be enrolled as a Scheduled or Backward Caste!

Abandonment and adoption of customs

There was yet another phenomenon that was beginning to have effects, and which, if it had been allowed to continue, would have had revolutionary social effects. The Census officials of province after province reported that, to get themselves recognized as a higher caste, the caste that thought it was low in the scale was abandoning customs and practices which were associated with backwardness.

We have renounced eating beef, the tribals said in support of their claim to a higher caste, we have given up liquor.³ Lower castes were refusing certain kinds of labour in Assam – carrying sweetmeats,

¹Madras, pp. 334-35.

²Central Provinces and Berar, pp. 368-69.

³Bengal and Sikkim, p. 425.

carrying palanquins. They began to wear the sacred thread. They made a conspicuous effort to ensure that their habitations were more hygienic. They gave up rearing animals that the others considered unclean – such as pigs. They gave up wine and tobacco. They began to observe fasts on given days. They began to reverence the cow. They gave up eating the carcass of cattle. They began worshipping the idols that the higher caste persons worshipped. They began to put off the marriages of their girls to a reasonable age. They began to reduce expenditures on marriages and funerals. They made a determined effort to take to better occupations. In much of this, the caste associations that had been formed did pioneering work.

So intense was this movement towards “Sanskritization” as it was later to be called that, in their anxiety to establish that they belonged to such and thus higher caste, the aspirants began to adopt some of the practices which, as the Census officers noted, “enlightened Hindus are coming to regard as retrograde” – they gave up widow remarriage; some adopted *purdah*; some began to refuse food cooked or served by castes that were even lower down in the scale, castes from which they were trying to distance themselves...¹

And now

That apart, the striving was for upliftment, for getting one's group being accepted in a higher notch. For this purpose a determined effort had begun to shed customs and occupations that were unhygienic, and unacceptable. And since? Gujarat illustrates what is happening now.

As we will notice elsewhere, the Bakshi Commission had based its lists of “backward classes” on caste. Agitations of such severity had followed that the Gujarat Government had to appoint yet another Commission, the Rane Commission.²

The extensive tours it undertook and the heaps of representations it received, vividly brought home to the Commission what reservations-on-caste-basis were doing to society. “Some of those castes which are now clamouring for being considered as socially and educationally

¹See, for instance, *Assam*, pp. 207, 218; *Bengal*, p. 425; *Central Provinces and Berar*, p. 355; *Bihar and Orissa*, pp. 268-69.

²Headed by Justice C.V. Rane, former judge of the High Court, the Commission was set up in April 1981.

backward," the Commission observed, "were till recently claiming a higher place in the caste hierarchy." "The manner in which representatives of some of the castes who appeared before us, had submitted their cases for treating the caste to which they belonged as socially and educationally backward, shows that organised efforts are being made to set the clock back by attaching various types of labels of backwardness to their castes," Justice Rane and his colleagues recorded. "We feel sad to find that the very castes which were at one time claiming for [*sic*] higher ranks in caste hierarchy and showing progressive trends, have now reversed the process and submitted before us that they are socially and educationally backward."

The Commission nailed the turning point, "the roots of the above change in their outlook": the Report of the first Backward Classes Commission which prepared a list of 2,399 "backward castes", and the subsequent concessions that were given to the castes that had been so anointed. "It appears that, in view of various types of concessions and adventitious aids which include reservation of seats in educational institutions and of posts in services under the state that are going to be given to socially and educationally backward classes...", the Commission recorded, "there has been a total change in the outlook of a large majority of castes in Gujarat and they have made organised efforts for being considered as socially and educationally backward in order to acquire eligibility for receiving various benefits that are being given for socially and educationally backward classes by the state."

I.P. Desai, the sociologist who was a member, in his concurring note to the Report of the Commission, drew attention to another telling fact: even where the occupation of a person or group was one he or its members had pursued traditionally – say, hair-cutting – the web of relationships in which it was conducted had entirely changed. The old *jajmani* relationships had been replaced by contractual relationships – between the employer, the owner of the salon, and the barber, between the latter and the customer.

"We have found that some of the castes, just for the sake of being considered as socially and educationally backward, have degraded themselves to such an extent that they had no hesitation in attributing different types of vices to and associating other factors indicative of backwardness of their castes," the Commission recorded.

Representatives of such castes, the Commission noticed, "submitted their cases in an exaggerated manner." A representative characteristic they claimed as an affliction which entitled them to be recognized as backward was drunkenness – this in spite of the fact that the state had, and has prohibition! "It is extremely doubtful whether," the Rane Commission observed, "but for the temptation of being considered as socially and educationally backward, they would have attributed above blemishes [*sic.*] to their castes."

For all these reasons, the Commission emphatically decided against using caste as the criterion for assessing backwardness. Using it would perpetuate the evils of the caste system, it emphasized. While our Constitution-makers aimed at creating a casteless society, the method of identifying backwardness has accentuated caste awareness and caste politics, it reported. "We are firmly of the view that caste system has been hindering our progress towards an egalitarian society and that identification of backward classes in terms of caste will perpetuate the above evil," it said. "If caste was made the unit for identifying backwardness," I.P. Desai wrote in his concurring note, "we would be legitimising the caste system by State action as the British and pre-British Indian rulers did, while it is definitely not what it was say even 40 years ago." Unfortunately, all Commissions that have been assigned the task of identifying groups to whom special concessions and facilities should be extended "were too much possessed by caste," Desai wrote. Today occupations are not being looked upon as "pure" and "impure", but as "physically clean" and "physically unclean".

"It is, therefore, advisable as far as possible," the Commission concluded, "to identify socially and educationally backward classes in such a manner that those falling within such classes need not have any cause to temptation for humiliating their castes by attributing various types of shortcomings and vices to them, in their anxiety to ensure that the label of backwardness sticks firmly to their caste." And there was another advantage, the Commission noted, of identifying backwardness independently of caste, on the basis of occupation, for instance: when criteria such as occupation are used, "the label of backwardness on an occupational basis could be cast off by a person at his will, by hard work and dealing with the problems of occupation and life in an intelligent and practical manner; whereas the label of

caste and the stigma of backwardness that may attach to a person, in case the caste to which he belongs is identified as socially and educationally backward would stick to him till his death." In fact, using criteria other than caste "would provide an incentive to those belonging to castes which are considered inferior to cast off the stigma attached to their castes without any delay."¹

And that is precisely the reason why our casteist politicians do *not* want the classification to be on any basis other than caste! The group they want to inflame and frighten would then graduate out of victimhood!!

¹Government of Gujarat, *Report of the Socially and Educationally Backward Classes (Second) Commission*, Volume I, Government of Gujarat, 1983; in particular pp. 47-48, 52-54, 67-68, 107-08, 113-14. See also, *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 732-33, para 24.

The nebulous made solid

M.W.M. Yeatts was by now Census Commissioner. Work had been going on for the 1941 Census. He had decided that the Census would no longer attempt any record of castes. Questions began to be raised about this decision. The Home Member, Sir Reginald Maxwell¹ himself was unhappy. A master at "Divide and Rule", he knew only too well the usefulness of the count. But Yeatts held his ground – for a while. When in 1939 queries were sent to him about the omission of caste and suggestions advanced for inclusion of new items – sources of livelihood, income levels, etc. – he recorded how every additional item increased the expense of enumeration and even more so of tabulation. Moreover, he wrote back on file, "To seek detail for detail's sake is the great pit into which statisticians – and the public who pursue them – so often fall. I am determined that the Indian Census should avoid this." "Apart from the intellectual reasons condemning such a practice," he added, "there is the important consideration that the Indian Census has reached perhaps the limit of manageability from the point of view of cost and possibly, unless care is taken, from the point of view of dimensions also. If detail is thoughtlessly added, a noble and historic undertaking may be swamped in it."²

He was told that some provincial governments had raised objections to the omission of caste. Yeatts, therefore, decided that

¹Sir Reginald is the one who, along with the Additional Secretary, Sir Richard Tottenham, maneuvered to defeat the Quit India Movement. He is the one with whom P.C. Joshi, the then General Secretary of the Communist Party of India, had those secret meetings, with whom the Communists struck that secret understanding to sabotage the Quit India Movement, and to whom they submitted their reports about what useful work they had done to accomplish that task. The maneuvers are documented in my *Worshipping False Gods*, ASA, New Delhi, 1997; and *The Only Fatherland', Communists, 'Quit India' and the Soviet Union*, ASA, New Delhi, 1991.

²National Archives, File 1/1/39–Public.

broad categories would be tabulated: "Brahmins", "Other Hindus", "Scheduled Castes", and "Primitive Tribes". Maxwell was not satisfied. It is not clear whether the Census Commissioner means only that caste will not be *tabulated* or that it would not even be enumerated, Maxwell recorded in a detailed note, nor "why he classes scheduled castes and primitive tribes as 'among Hindus'. If this were the case (1) 'Brahmins' and (2) 'Other Hindus' would be the only two categories." He cited the opinion of "a majority of Provincial Governments" that caste is "so much built into the social structure that it could not be omitted and that although some Governments seem to refer only to the broad divisions of the Hindu social structure others obviously contemplate a recording of castes in detail, and this opinion must have due weight."

A meeting was consequently held between the Home Secretary, Conran Smith, and Yeatts, and eventually between them and Maxwell. The question in the 1941 Census would be the same as in the 1931 Census, it was decided. The answer that the respondent gives is what will be recorded. The question of whether the data would be tabulated caste-wise will be decided later, depending on the finances that become available for the Census, and the cost that such tabulation will entail. The record of the meeting added, "The H.M. [Maxwell] expressed doubt regarding the classification of scheduled castes and primitive tribes among Hindus." "It is possible for a person to belong to the scheduled castes and also profess the Hindu religion," it was explained, "but the questions are distinct and will be answered separately."¹

A conference of Census officials was convened. In his note to the Home Secretary reporting the conclusions of the meeting, Yeatts wrote, "As the Home Department are aware I regard the treatment of caste on any detailed scale as having passed outside the range of Census competence or financial possibility. I had hoped to be able to express this in the form of a question but the existence of a strong desire in the western provinces for a return of Muslim tribes and importance of securing a correct return of the primitive tribes in other parts of India, has led me to the conclusion in which the conference concurred that the form of question should be 'race, tribe or caste'."

¹National Archives, File 45/9/40-Public.

Logically, this question alone should be asked, he wrote, the total for Hindus could be obtained by adding up the caste figures. But the general feeling at the conference was that "the omission of the religion question at this stage would be misunderstood."

Hence, two questions would be asked: "race, tribe or caste", and "religion". "I wish to emphasise however that I have no intention proposing tabulation of anything beyond the broad categories, Brahmins, other Hindus, scheduled castes and primitive tribes, among Hindus, if indeed even that is done," Yeatts wrote, words from which it would seem that he was sticking to his guns in the main. The next sentence, however, betrayed the extent to which Maxwell's Machiavellian pressures had worked: "The community totals of course will be shown, i.e. Hindu, Muslim, Scheduled Castes etc., etc." – that is, Scheduled Castes would be *taken out of* the total for Hindus. If any more detail is required, the province would pay for it.

In the event, the questions remained as they had been in the 1931 Census. And the onus for the continuation of the caste enumeration was put on the Hindus! When Bhai Parma Nand asked questions about this in the Assembly, the note for Maxwell's reply maintained, "The inclusion of caste in the questions regarding the Census is not a new thing, and without the mention of caste a section of the Hindus, who may be keen on the preservation of the caste system or want to record their numerical strength for the purpose of special franchise or other considerations, may have reasonable grievances." Given this *potential* grievance, "It follows, therefore, that the only impartial course is to retain the column for caste. It will then be for those sections of the Hindus who are averse to recording their castes not to reply to this query, as the standing instructions require the recording of only the answer given by the citizen. A person who does not reply to the question about caste can thus secure his own object without putting to inconvenience another section of the community."¹

By the time the Census was actually undertaken, Britain was immersed in War. The exercise, therefore, necessarily had to be less elaborate.

But, in addition, two factors that had cast hurdles in 1931 worked further to persuade the authorities to give up caste-wise tabulations all

¹National Archives, File 45/9/40–Public.

together. As M.W.M. Yeatts, the Census Commissioner, noted in his final report, the movement not to ascribe a caste to oneself had gained ground – “an interesting phenomenon at this Census was the widespread refusal of Hindus in Bengal and to a less extent elsewhere to return any caste at all,” the Census Report recorded in Yeatts’ review of the 1931 Census operations. Second, there were the difficulties that Hutton had recounted in detail: the new Census Commissioner said that he had nothing to add to the account of Hutton in this regard, and seemed relieved that the totals were not being made at the All-India level. It had been decided that if any province or private authority wanted caste-wise enumerations and tabulations – because of jobs in government being distributed on this basis, for instance – it would pay for the work.

Categorization by religion too had led to much tension and pressure, especially in Bengal and Punjab. “So long as the political system is based on separate electorates,” Yeatts observed, “this question is difficult and even dangerous.” “In one major city, Lahore,” Yeatts observed, “communal passions were violent enough to destroy the value of the enumeration record.” “If joint electorates come in, much of the difficulty will be avoided. If not, then early thought must be given to the means of securing a valid record.” Of course, it was not for Yeatts to record that separate electorates were instigated and instituted by the same British Government for whose edification the review Report was being written.

Two observations in passing give us a glimpse of long-lasting pursuits of the British administration. “*Religion* should go,” Yeatts wrote, “and the single community question be put as was suggested ten years ago by Dr. Hutton.” “The only case where religion is important is where members of tribes, *e.g.*, have been converted to Christianity. Indian Christians are a recognized element in the country and its political system; consequently they should be considered as a ‘community’ for the purposes of the community table. On the other hand, tribal origin is a circumstance of great importance which should find a record....”

The other observation concerns the enumeration of “Race, tribe or caste.” The category is one of the oldest in the Census returns, Yeatts noted, and “yet misconceptions still attend it.” “For instance, there was an impression that Muslims were expected to return a caste and in

general the idea of the three categories as *alternatives meant for different elements in the population* has even yet not made complete penetration" – sections categorized as "tribal" thus are different from sections for whom a "caste" is listed: the latter are "Hindus" and the former are not!¹

Leaders of the new, independent India were clear and determined: caste must be eliminated from official policies and institutions. At the first Census Conference after Independence, Sardar Patel, with his usual directness, told the delegates and Census officials, "Formerly there used to be elaborate caste tables which were required in India partly to satisfy the theory that it was a caste-ridden country, and partly to meet the needs of administrative measures dependent upon caste division. In the forthcoming Census this will no longer be a prominent feature," and instead the Census would focus on basic economic data.²

Identifying the castes

Determining that 52 per cent of our people are "Other Backward Classes", of course, is not enough. To make its recommendations operational, the Mandal Commission had to specify which castes in each state were backward. And to do so it had to assess several things about them: from nebulous things like the extent to which they were discriminated against socially to easy-to-get things like the extent to which they were represented in services, elected bodies, etc.

It accomplished this in three leaps.

First it took as its base the lists which were in use in different states, and the replies to its questionnaire.

A rickety base if ever there was one. And that on its own telling.

The Commission recalled in its Report judgments by which courts had struck down, for instance, the list in use in a state like Kerala as it was found to be "based on obsolete and out of date data." Courts and commissions, the Mandal Commission recorded, were compelled to recommend that new surveys be done to give substance to the lists.

Furthermore, it stated that in spite of these judgments and

¹For the preceding, *Census of India, 1941, Volume I, India, Part II, Administration Report*, Manager Government of India Press, Simla, 1942, pp. 20-21.

²D. Natarajan, *Indian Census Through Hundred Years*, Office of the Registrar General, India, Ministry of Home Affairs, New Delhi, 1972, pp. 265-66.

recommendations, eight states and Union Territories "have notified lists of Other Backward Classes *without ordering a formal inquiry into their conditions.*" These included Haryana, Himachal, Assam, Rajasthan and Orissa.

The Commission sent out its questionnaire. The response of the states indicated not just the extent of their anxiety to help the Commission but also the data they had on the basis of which they made such determinations.

"It was rather disappointing to see," the Mandal Commission lamented, *"that hardly any state was able to give the desired information..."*

"Repeated reminders," it said, *"and contacts at personal level did not materially alter the situation."*

"Several questions in this section," it recorded, "pertained to the representation of Other Backward Classes in elected bodies, services, etc. *A couple of states have replied to these questions and even these replies are scrappy and inadequate.*"

"Only Gujarat has furnished information regarding representation of OBCs in local bodies..." it recorded.

"Regarding the representation of OBCs in higher public services," it wrote, *"only a couple of states have given some information..."*

"The above information is too sketchy and scrappy," it said, *"for any meaningful inference which may be valid for the country as a whole."*

"This section (entitled 'Census')," it recorded about the next brick in the structure it was building, "sought to collect information on various demographic aspects of Other Backward Classes, denotified tribes, advanced castes and to compare lists of Other Backward Classes prepared by Kaka Kalelkar Commission, with those notified by various state governments. *The information supplied was very inadequate.*"

It noted the vast disparities in even the *number* of castes recognized as backward by the Kalelkar Commission and by the state governments: 124 versus 95 in Andhra; 44 versus 119 in Assam; 88 versus 64 in Haryana; 27 versus 48 in Himachal; 64 versus 181 in Karnataka; 48 versus 76 in Kerala; 360 versus 196 in Maharashtra; 148 versus 111 in Orissa; 88 versus 62 in Punjab; 156 versus 1245 in Tamil Nadu; 120 versus 56 in U.P.

The main reason for this, the Mandal Commission opined, was that, while the state governments "prepared their lists on the basis of *some sort of field survey and investigation*," the Kalelkar Commission "had mostly borrowed the lists prepared by the Ministry of Education for the award of post-Matric Scholarship"! Even that claim about "*some sort of field survey and investigation*" in the case of the former, in fact, was an exaggeration: just a few pages earlier the Commission itself had been constrained to record, as we noted a moment ago, that among these very states, Haryana, Himachal, Assam, Orissa had notified their lists "without ordering a formal inquiry into their conditions."

The second reason that the Mandal Commission listed for the differences in the numbers tells the tale even better: "Secondly", it recorded, "*the pressure of field situation and local factors* may have also influenced the judgement of state governments in the preparation of these lists."

To assess the position of the castes, the Commission needed data on their education levels. It sought the data from states. "*No state government*," it had to write, "*could furnish figures regarding the level of literacy and education amongst Other Backward Classes.*"

It needed data on the extent of employment among them, as well as about the occupations on which they were dependent. "*No state government could furnish any precise information on this point*," it recorded.

And so on.

The survey

The Commission ordered a field survey to identify the backward castes. Much is made of this survey by proponents of the Commission. But the Commission itself was very modest about its worth.

This is how it put the claim:

In the end it may be emphasized that this survey has *no pretensions to being a piece of academic research*. It has been conducted by the administrative machinery of the government and used as a *rough and ready tool* for evolving a set of simple criteria for identifying social and educational backwardness. Throughout this survey our approach has been conditioned by *practical considerations, realities of field conditions, constraints of resources and trained manpower and paucity of time*. All

these factors obviously militate against the requirements of a technically sophisticated and academically satisfying operation.

And there is a further problem. The survey used eleven criteria to assess whether a caste was backward. Whether it is considered socially backward by others; whether it depends mainly on manual labour; whether at least 25 per cent females and 10 per cent males above the state's average get married at an age less than 17 years in rural areas and at least 10 per cent females and 5 per cent males do so in urban areas; whether female participation in work is at least 25 per cent above the state average – these four were the “social indicators”. There were three “educational indicators”: indices about attendance in schools, about dropouts from schools, and the proportion of matriculates. And four economic ones: the average value of family assets, the proportion living in *kuchcha* houses, the distance from the source of drinking water, and consumption loans taken by households.

Each caste was assessed on each criterion. And in regard to the quantifiable criteria, it was given a point if its deviation from the state's average exceeded 25 per cent.

But how were the eleven indices to be combined into a composite score? The social indicators were given a weightage of three points each; the educational indicators, two points each; and the economic ones, one point each. These were then totaled for the caste. The maximum score that a caste could pile up was 22. Thus, by Mandalian logic a caste that scored eleven or more became “Backward”!

The simple question that needed an answer – the simplest question, that is – was: how robust is the classification of a caste as “Backward”? To what extent does it alter if some other – equally justifiable – criteria are used rather than these eleven? To what extent does it alter when the relative weights attached to the individual criteria – three each to numbers (i) to (iv), two each to numbers (v) to (vii), one each to numbers (viii) to (xi) – are altered?

Quite apart from the reliability of the data collected in the survey, and the choice of these criteria rather than some others, much would turn on the relative weights which were attached to the eleven criteria. What is the explanation the Mandal Commission gave for the “three each for social”, “two each for educational”, and “one each for

economic" formula? Two cryptic sentences – "Economic, in addition to social and educational indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also."

Two sentences which do not even address the question of robustness.

The result

On page 53 of its Report, the Mandal Commission extolled the virtues of its criteria, its survey, its method of aggregation: "...Thirdly, this method was found to be highly dependable in practice. For instance, as a result of its application, most of the well-known socially and educationally backward castes were identified as backward."

But on the very next page it invoked the need to apply additional criteria:

In view of the foregoing the Commission has also applied some other tests like stigmas of low occupation, criminality, nomadism, beggary and untouchability to identify social backwardness. Inadequate representation in public services was taken as another important test.

And by the next page it was compelled into candour:

In this context it may also be stated that in some cases, the findings based on socio-educational field survey *happened to be inconsistent with the living social reality*. For example, the social status of Kasera, Kumbhar in Rajasthan, Badager in Tamil Nadu, etc. is known to be very low. Yet these castes scored below 11 points and, thus, qualified for ranking as forward. Such aberrations are bound to occur in any sociological survey which is based on statistical methods owing to *lopsidedness of the sample covered*. The only corrective to these aberrations is the *intimate personal knowledge of local conditions* and the use of massive public evidence produced before the Commission. The results of the field survey have been carefully scrutinized and such aberrations rectified as far as possible.

A survey. Its results improved by "personal knowledge gained through extensive touring of the country and receipt of voluminous public evidences..."

And by the very "Lists of OBCs notified by various state

governments" about the gross inadequacies of which the Commission itself, as we have seen, had so much to say!

By such magic mixing together of unknown potions in unknown quantities, came the list that has since become gospel for governments: a list of 3,743 castes. And these 3,743 castes are largely among the Hindus alone. Most of the non-Hindu ones are still to be put together, the Mandal Commission recorded.

The first thing to notice is that, contrary to what the Constitution requires, the Mandal Commission started with and ended with castes.

Recall its starting point. How did it determine that these "Other Backward Classes" are 52 per cent of India's population?

It began and ended by tabulating the *castes* in the 1931 census.

It did absolutely nothing else.

That can be seen in paragraph 12.19 on page 56 of the Report.

By the next paragraph on the same page these *castes* become "Other Backward *Classes*".

And the constitutional requirement is satisfied!

Again, when it came to identifying individual entities which should qualify for reservations, the Commission looked for *castes*.

The survey was organized around *castes*.

The "intimate personal knowledge" it deployed was about *castes*.

The list of 3,743 entities that it furnished as the result of its labours is a list *castes, castes, nothing but castes*.

The next point to bear in mind is about that "Survey" the Mandal Commission said formed the basis of its lists. Professor B.K. Roy-Burman who headed the team revealed¹ that each of the suggestions of the experts was ignored; that instead of 151 tables suggested by them being used, 31 were used; that the data collected were concealed from the experts; that while experts had concluded that occupation was a better criterion of backwardness, or at best a blend of occupation and caste should be used, the Commission plummeted for caste alone; that the tampering commenced precisely after a pilot survey in West Bengal showed that only two occupational groups – blacksmiths and potters – could properly be regarded as "backward"; that the weights arrived at by the experts for the different criteria were

¹ *The Indian Express*, August 31, 1990.

arbitrarily dumped and another set fabricated; that the Commission inflated its estimate of the proportion backwards are of the population by imaginative triple counting; and so on.

The Commission itself recorded, as we have just seen, that the survey it conducted, by excluding the experts it now turns out, yielded results that were not adequate and that therefore the Commission modified them using its own "intimate personal knowledge" – of course, its Report does not disclose in how many cases and to what extent the results were thus modified.

No wonder, the results were of indeterminate worth. In a letter to the Prime Minister, Mr. Biju Patnaik pointed to some laughable aspects of the list the Mandal Commission had furnished in the case of Orissa. Twenty-odd castes which it had listed as being "Other Backward Castes" are in fact already recognized as Scheduled Castes, Mr. Patnaik pointed out! The Commission lists as castes entities which are just surnames, and surnames which are used by high-caste persons too, he informed the Prime Minister!! Some "castes" it had listed are untraceable in Orissa.

The West Bengal government too said that it was not able to even trace some of the "castes" the Commission had listed.

In the case of U.P., Bihar, etc., the Commission had listed as "backward", castes which are in fact dominant, and domineering.

Justices Kuldip Singh and Sahai on Mandal's list

For reasons such as these, in *Indra Sawhney*, both Justice Kuldip Singh and Justice R.M. Sahai roundly condemned the lists that the Mandal Commission had prepared – lists that form the basis of the castes that are today termed as "backward" and which have accordingly been given access to reservations.

To begin with, Justice Kuldip Singh pointed out, the Commission was required by its Terms of Reference, "to examine the desirability or otherwise of making provision for the reservations of appointments or tests... in public services." "This most vital part of the Terms of Reference was wholly ignored by the Commission," Justice Kuldip Singh observed. "Before making its recommendations the Commission was bound, by the Terms of Reference, to determine the desirability or otherwise of such reservations. The Commission did

not at all investigate this essential part of the Terms of Reference." The result is that discourse continued the way it had been – that is, without the aid of empirical data, a "discourse" in which opposite sides continued to assert their respective positions almost as non-arguable religious positions!

Worse, Justice Kuldeep Singh pointed out, the Mandal Commission did no work to establish either the "backwardness" or the inadequate representation of the 3,743 castes it proclaimed to be backward and thereby entitled to reservations. "The so-called 'socio-educational field survey'," the Judge found on inquiry, "was an eye-wash." Only two villages and one urban block in each district of the country were taken into consideration, he wrote. Only 0.06 per cent of the villages in the country were surveyed. What was done was just "clerical", the Judge established. A large number of castes were picked up without inquiry from the state lists – a procedure that was "wholly illegal", the Judge held. Many were picked up from the Report of the very Commission that the Mandal Commission itself condemned – the First Backward Classes Commission headed by Kakasaheb Kalelkar. Reviewing the list of castes and the fact that it had been pasted together from diverse sources without inquiry, Justice Kuldeep Singh wrote, "A collection of so-called backward castes by a clerical-act based on drawing room investigation cannot be the backward classes envisaged under Article 16(4)," and warned, "If the castes enlisted by Mandal are permitted to avail the benefit of job-reservations, thereby depriving half the country's population of its right [to equality] under Article 16(1), the result would be nothing but a fraud on the Constitution" – the precise fraud that has in fact been heaped upon it since.

The worst of it was that, as Justice Kuldeep Singh noted, "The Mandal Report virtually re-writes Article 16(4) by substituting caste for class." Caste had been made the "sole and exclusive test" for determining which group was backward and which was not. "Every other test – economic or non-economic – has been wholly rejected," the Judge was constrained to remark. Coming to the fabled "indicators" that the Mandal Commission's much-vaunted "Survey" is said to have used, Justice Kuldeep Singh stressed that these too had been applied to castes alone. "The obsession" of the Commission with casteism is such, he

wrote, that "The Mandal Report invents castes even for non-Hindus." As a result, the entire approach of the Commission "was anti-secular and against the Basic Features of the Constitution," he concluded.

Turning to the figures at which the Commission had arrived, in particular its estimate that backwards constitute 52 per cent of the population of the country, the Judge wrote, "To say the least, the exercise to reach the figure of 52% is wholly imaginary. It is in the realm of conjecture." He drew attention to the fact that the last set of caste-wise figures that had been published was from the 1931 Census, and he drew attention to the farcical extrapolations from these figures that the Mandal Commission had made, remarking, "It is difficult to imagine how anybody can accept such illusory and wholly arbitrary calculations." He was constrained to characterize the Commission's assumption that the relative rates of growth of different castes had remained unchanged since 1931 as "absurd". For one thing, he pointed out, in 1931 "India" comprised of Pakistan, Sri Lanka, Bangladesh, Burma also! How could it be that these vast territories had been hived away, that communities had fared variously in economic and social affairs, and yet their relative rates of growth that prevailed in the 1920s were the ones that prevailed fifty years later?!, the Judge inquired.

Furthermore, such information as was available to the Mandal Commission, on the Commission's own showing, was "woefully inadequate". "Essential data was non-existent," Justice Kuldeep Singh observed citing what the Commission itself had recorded: In paragraph 9.4, the Commission had stated, "Hardly any state was able to give the desired information"; as for the extent to which the backward castes were already in services of the government, the information received by the Commission was, it recorded in paragraph 9.14, "too sketchy and scrappy for any meaningful inference which may be valid for the country as a whole"; similarly, in paragraph 9.30, it informed Government, "No state government could furnish figures regarding the level of literacy and education amongst the backward class"; as for the lists it was stitching up, the Commission, in paragraph 9.47, acknowledged, "No list of OBCs is maintained by the Central Government, nor their particulars are separately compiled in Government offices." The Judge, therefore,

held, *inter alia*, "The identification of 3,743 castes as a 'backward class' by the Mandal Commission is constitutionally invalid and cannot be acted upon."¹

Justice R.M. Sahai was equally categorical in rejecting the identifications and estimates of the Mandal Commission. He pointed out that on its own showing, the Commission had proceeded to collect and organize such data as it had deployed along caste lines. He reproduced the Commission's own account of the "criteria" on which it had collected information during its so-called "Survey":

A: Social

- (i) *Castes/Classes* considered as socially backward by others.
- (ii) *Castes/Classes* which mainly depend on manual labour...
- (iii) *Castes/Classes* where at least 25% females...
- (iv) *Castes/Classes* where participation by females...

B: Educational

- (v) *Castes/Classes* where the number of children...
- (vi) *Castes/Classes* where the rate of student drop-out...
- (vii) *Castes/Classes* among whom the proportion of matriculates...

C: Economic

- (viii) *Castes/Classes* where the average value of family assets...
- (ix) *Castes/Classes* where the number of families living in *kuchcha* houses...
- (x) *Castes/Classes* where the source of drinking water....
- (xi) *Castes/Classes* where the number of households having taken consumption loan...

And it was evident to the dullest observer that the inclusion of "classes" in the listing was just the formal genuflection to accord with the terminology required by the Constitution.

The Commission had gone on to record,

... All these 11 indicators were applied to all the *castes* covered by the survey for a particular state. As a result of this application, all *castes* which had a score of... were listed as socially and educationally backward and the rest were treated as 'advanced'...

And in paragraph 12.2, the Commission while summing up this enumeration had stated,

¹C.f., *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 500, para 394.

As the unit of identification in the above survey is *caste*, and caste is a peculiar feature of Hindu society only....

"Caste was thus adopted as the sole criteria [*sic.*] for determining social and educational backwardness of Hindus," Justice Sahai concluded, even as the Commission had come down on the Kalelkar Commission for having adopted caste as the criterion!

And the method of converted residuals, so to say, adopted for non-Hindus only confirmed the unconstitutionality that the Commission had committed: those who have converted to other religions from castes which have been included as backward castes shall be the backwards of other religions, the Commission decided in para 12.8 of its Report! After showing in detail how the Constitution prohibited basing this sort of classification on caste, a matter to which we shall revert, Justice Sahai noted, "The constitutional constraint in such identification does not undergo any change because different groups or collectivities identified on caste are huddled together and described as backward class. By grouping together, the cluster of castes does not lose its basic characteristic and continues to be caste."¹

And since then

Differences between the then Prime Minister, V.P. Singh, and his Deputy Prime Minister, Devi Lal, had boiled into open hostility. Caught in a forgery that we at the *Indian Express* nailed, Devi Lal had to quit. He announced that he would hold a rally in Delhi's Vijay Chowk. V.P. Singh lost his nerve. To pre-empt that rally, he lunged for Mandal. Agitations erupted across the country.

Has the situation changed in the intervening ten years? Is the list in use in your state based on some systematic survey, I asked my colleagues at the *Indian Express*. They contacted the authorities. Here are the answers they received.

Andhra: No survey "in the strict sense" has been conducted; castes have been identified on the basis of the report submitted by a committee headed by K.N. Anantaraman in June 1970.

Assam: Mandal's list has been adopted plus the results of "some sort of rough survey"; in this survey "geographical remoteness, food

¹ *Indra Sawhney*, *op. cit.*, at 599-602, paras 585-587.

habits, living patterns, economic standards and educational status" were used as criteria "but they were followed very loosely."

Bihar: Castes have been added to the list periodically; my colleague was told that, apart from other things, the Government had used results of the work of two research institutions in the state.

Goa: A survey was the basis of identifying Scheduled Castes; no survey was undertaken for identifying Other Backward Castes, instead castes were recognized as backward "on the basis of projections made by OBC leaders."

Gujarat: A mixture of "claims and suggestions" and the results of a survey conducted by the Bakshi Commission in 1972-76 have been used.

Haryana: No survey was ever carried out to determine who constitute the OBCs, nor were there any definite criteria or guidelines to determine backwardness; officers affirmed that castes are recognized as backward "on the suggestions or recommendations of politicians and leaders."

Jammu & Kashmir: Surveys were said to have been done; in the troubled conditions at the time, it was not possible to verify their worth.

Karnataka: It is one state in which a comprehensive survey was said to have been done; but see below for what happened to major entries in it.

Kerala: The list was prepared by the Nettoor Commission years ago; it was not based on any comprehensive survey; "information provided by heads of departments and institutions was used... a few random sample surveys in villages and towns were used... scanty police records and newspaper reports of untouchability served to determine historically backward classes..." reported my colleague.

Madhya Pradesh: No organized survey was undertaken; guidelines for identification of a caste as backward were also vague; educational and social criteria were said to have been used "which the present set of bureaucrats is not able to elaborate."

Maharashtra: No comprehensive survey; list in use originated primarily from the recommendations of a committee headed by an MLA which submitted its report in November 1961.

Orissa: As the Chief Minister stated, the state had no list of OBCs at all.

Punjab: Periodic surveys of indeterminate substance and comparability were said to be the basis.

Rajasthan: No survey had been made to identify OBCs, and the concerned departments of the state government did not have any list of OBCs from which to operate.

West Bengal: The state government did not seem to have any information about identifying OBCs.

Tamil Nadu: From British times, castes had been periodically recognized as backward on the basis of petitions and departmental assessments; no surveys were done; the fate of the Enumeration Commission which was set up in January 1988 is noted below.

Uttar Pradesh: No survey; instead recommendations of the Chedilal Sathi Committee, which reported in 1975, and, of all things, the Mandal Commission, seem to have been the main sources for the list.

Thus, apart from Karnataka and two or three other states, there was hardly a survey to speak of. Instead, *ad hoc* additions; a diverse collection of criteria, varying from committee to committee, from state to state, and these combined with varying, in most cases unknown, weightages.

The real determinant

And supervening over all these, the real determinant – muscle power.

The Havanur Commission removed Lingayats from the list of Backward Classes in Karnataka. The Venkataswamy Commission removed the Vokkaligas too. Violence followed. The Government restored both to the list.

In September, 1987, the Vanniyar Sangham in Tamil Nadu claimed that 65 lakh Vanniyars in the state constituted a fifth of the state's population and therefore deserved an exclusive reservation of 20 per cent. It launched a violent agitation. That triggered off a fresh wave of demands from other caste-based organizations. During his last days, MGR held discussions, more accurately these were held on his behalf with about 100 of them. The process of examining their demands came to naught as the population figures projected by each of them, when added up, far exceeded the total population of the state!

In January 1988, the state came under President's Rule. After discussions with the Vanniyar Sangham, both at the Central and state level, the Tamil Nadu Government accepted in principle the need for exclusive reservations for the Most Backward Castes, including the Vanniyars, as distinct from Backward Castes in general. An Enumeration Commission headed by P.V. Venkatakrishnan was set up to conduct a census of the Most Backward Castes including the Vanniyars. The latter were not assuaged and demanded an interim reservation for themselves. Karunanidhi came to power in 1989, and announced in the Assembly that he had wound up the Enumeration Commission so as to decide the issue at the earliest – the Vanniyars having given him an "ultimatum" in this regard. On 11 March 1989, he announced 20 per cent reservation for the Most Backward Castes, including the Vanniyars. Karunanidhi's caste was naturally among the Most Backward Castes.

This is the manner in which additions to the list, indeed reservations themselves have been wrested.

Such was the basis of the Mandal Commission's list.

Such, that of the state lists.

Only two things have been certain: whichever caste has got organized, whichever has gained clout, has got itself anointed "backward"; second, the number thus anointed has continued to swell. Dr. P. Radhakrishnan, Fellow of the Madras Institute of Development Studies, records that the list of Backward Castes in Tamil Nadu grew from 11 in 1883 to 39 in 1893 to 46 in 1903 to 122 in 1913 to 131 in 1923 to 182 in 1933 to 238 in 1943 to 270 in 1953. The Mandal Commission listed 288 for that state, a state from the government service of which, and from several professions in it, those not fortunate enough to be Backward have been well nigh driven out.

Here is a country that is progressing, rapidly so if we go by the proclamations of successive governments. But more and more communities keep becoming Backward!

Marc Galanter sets out another typical sequence in his, *Competing Equalities*. The government appointed a committee in June 1965 under the Law Secretary, B.N. Lakur, to review the list of Scheduled Castes and Tribes who are entitled to reservations, etc. It listed 14 tribes and 28 Scheduled Castes which, the evidence

it had received, led it to believe had since their inclusion become "relatively forward".

A storm ensued.

Ostensibly to give effect to Lakur's recommendation, on 17 August 1967, the Government introduced a Bill to amend the lists. It did not leave out any of the tribes or castes which Lokur's evidence suggested had become "relatively forward"!

The Bill was referred to a Joint Parliamentary Committee. The Committee reported in November 1969. Among other changes it suggested an exclusion – that those who had converted to Christianity or Islam should no longer be taken to qualify for reservations.

Another storm ensued.

The Bill that was eventually passed – during the Emergency in August 1976 – had many things, but no exclusion!

The fate of every attempt to introduce a means test – a meaningful means test that is, not a farcical one like "OBCs who do not pay income tax" which for one thing leaves out every OBC rich farmer in the country – has been the same: it has got nowhere.

But who could not have foreseen the sequence? Who did not foresee it? We need go no farther than the Mandal Commission itself.

On Mandal's word

The Mandal Commission itself shows that castes have gone on being added to lists of OBCs not because successive surveys have chanced upon castes whose backwardness was hitherto unknown. New castes have had to be included because they have acquired power and clout.

The Commission's Report talks of the power their growing prosperity and their growing organization have been giving them. The Report itself alludes to how they sit over and exploit the poor Harijans, how they are better able to take advantage of the new facilities which become available.

The Mandal Commission lists 168 castes as "backward" in Bihar. Among these are Kurmi, Koeri and Yadava. This is on pages 178 and 179 of Volume VI of its Report. But on page 34 of Volume I of that very Report it says of those very castes:

The abolition of all intermediaries has definitely helped the hard working peasant castes like Kurmis, Koeries and Yadavas. These small peasant proprietors 'work very hard on their lands and also drive their labourers

hard' and any resistance by the agricultural laborers gives rise to mutual conflicts and atrocities on *Harijans*...

"The Kurmi, Koeri and Yadava peasant proprietors have been in a better position to take advantage of these factors (like new agricultural inputs, rising agricultural prices etc.)," says the study commissioned by the Mandal Commission and included by it in Volume IV of its Report. And, it adds, "*If the agricultural labourers show restiveness or political resistance, they do not hesitate to commit atrocities on them. This factor is at the root of the reprisals on the Harijans at Belchi, Pathada, Gopalpur, Bisbrampur, Parasbigha, etc.*" As a consequence, it says, "...there is no love lost between the peasant backward castes, on the one hand, and the Scheduled Castes and Tribes on the other."

At pages 211-212 of Volume VI of its Report, the Mandal Commission anoints 116 castes as "backward" in Uttar Pradesh. Among these are Gujar, Koeri, Kurmi, Lodh and Yadava. But on page 35 of Volume I of the same Report, the Commission itself has this to say about these very castes:

Land reforms produced similar changes in the political economy of Uttar Pradesh as in Bihar. The tenant and share-cropping castes of *Yadavas, Kurmi, Lodhs, Gujars, Koeries* became owner cultivators, and industrious as they are, they are better qualified to take advantage of the modern agricultural inputs.

The study which the Commission reproduces in Volume IV of the Report adds, "Unlike the 'umbrella farmers' of the forward castes, they are autonomous in their agricultural operations. *Like their counterparts in Bihar, they drive their agricultural labourers very hard. While striving to socially catch up with the forwards, they resent the rising political consciousness among the agricultural labourers.*"

But anointed "backward" by the Mandal Commission, these very castes today enjoy reservations, separate financial institutions, exclusive and centrally funded development programmes.

"One Shri L.R. Naik from the Scheduled Castes"

"The Commission," wrote Mandal in his letter forwarding the Report to the President, "*consisted of members from Other Backward Classes*

and one Shri L.R. Naik from the Scheduled Castes." And the Commission, according to its Report, operated on the following rule:

During the visits of the Commission or any sub-committee appointed by them to any State and during any sitting held by the Commission or the sub-committee in any State, the Commission may co-opt two persons, who belong to the State and *who are members of backward classes*, to be additional members of the Commission or the sub-committee, as the case may be.

A Commission to determine benefits to the "Other Backward Classes" all of whose members, save one, are from the "Other Backward Classes", all of whose additional members are from the "Other Backward Classes".

A packed bench?

But I am on that "one Shri L.R. Naik". It turns out that this gentleman submitted a Note of Dissent to the Report!

As we have seen, in Panditji's time, the Central Government itself was pointing to the danger that as the weaker castes had powerful elements, these elements would gobble up the benefits. The Mandal Commission itself recalled the Memorandum of Action Taken on the First Backward Classes Commission that the Central Government tabled in Parliament, and recorded,

Regarding the recognition of a large number of castes and communities as backward, it was pointed out, "If the entire community, barring a few exceptions, has thus to be regarded as backward, the really needy would be swamped by the multitude and hardly receive any special attention or adequate assistance, nor would such dispensation fulfill the conditions laid down in Article 340 of the Constitution."

And this is precisely the point which the member whom the Mandal Commission referred to as "one Shri L.R. Naik from the Scheduled Castes" made in his Note of Dissent. He recorded plaintively:

I hold very sincerely that castes/classes mentioned in the common list each having homogenous and cohesive characteristics, are not at the same degree or level of social and educational backwardness and I fear that the safeguards recommended for their advancement will not percolate to less unfortunate (*sic.*) sections among them and the constitutional objectives proclaiming an establishment of an egalitarian society will remain a myth.

He, therefore, partitioned the Mandal Commission's list of "Backward Classes" into two: one list of "Intermediate Backward Classes" and one of "Depressed Backward Classes".

He said,

During the course of my extensive tours throughout the length and breadth of India, I observed that a tendency is fast developing among "Intermediate Backward Classes" to repeat the treatments or rather ill-treatments, they themselves have received from times immemorial at the hands of the upper castes, against their brethren. I mean, "the Depressed Backward Classes". In an unequal society like ours, it is necessary that the Commission take all precautions so that the more helpless and needy segments are not deprived of the benefits of the various safeguards by avoiding cut-throat competition among unequals. The casteism is still very much in our midst and this is assuming new forms without showing much loss of its original vitality. In fact, several observers feel that the logic of democratic politics and mass mobilisation has brought casteism to the center of the stage. It is with regret, I affirm that political leaders belonging to "Intermediate Backward Classes" are not immune from such aberration nor they are imaginative enough to bring about the advancement of the people who are at the bottom of our society, such as these "Depressed Backward Classes". All that they seem to be doing is to emulate some disgruntled upper castes in usurping economic and political power in the name of backward classes. This is a mental aberration which deserves outright condemnation from whatever quarters it may emanate – whether from Upper Castes or Intermediate Backward Classes.

Do these castes fit the description?

Justice R.M. Sahai drew pointed attention to this danger in *Indra Sawhney*. He pointed to the preliminary difficulty. Different castes were recognized as backward in different states. Often this is so for good reason: many of them are "backward" in one state and not so in another state. Aggregating them for purposes of reservations in all-India Services would foment "confusion", he said. Furthermore, it would "encourage paper mobility" with candidates and employees moving from states where their caste is not anointed backward to states in which it *is* recognized as backward. Most important, he drew attention to the way the lists of backwards are getting to be drawn up, and pointed out that going by those lists may in fact "suffer from a constitutional infirmity." "Many groups or collectivities in different states are continuing or have been included in the state list

on various considerations political or otherwise," he wrote, and gave the example of what had been happening in Karnataka. "Commission after commission beginning from Gowda Commission, Venkataswamy Commission and Havanur Commission despite having found that some of the castes ceased to be backward they continue in the list due to their political pressure and economic power." He cited the findings of Ghanshyam Shah. In his *Social Backwardness and Politics of Reservations*, Shah has pointed out, "Among the *Sudras* there are peasant castes, artisan castes and nomadic castes. Subjective perception of one's position in the '*varna*' system varies and changes from time to time, place to place and context to context. For instance, the Patidars of Gujarat were considered *Sudras* a few decades ago, but now they call themselves Vaishyas, and are acknowledged as such by others. It is significant that they are not have-nots. Similar is the case of Vokkaligas and Lingayats of Karnataka, Reddies and Kammas of Andhra Pradesh, Marathas of Maharashtra and to some extent Yadavas of Bihar."

"Yet these castes or groups have been identified as backward class in their State," Justice Sahai noted.¹

Do these castes fit the description that judges of the Supreme Court give of sections on account of whose condition reservations are justified? "The frail and emaciated section of the people living in poverty, rearing in obscurity, possessing no wealth or influence, having no education, much less higher education and suffering from social repression and oppression..." we read. "Living below the poverty line and suffering from social ostracism..." "The undignified social status and sub-human living conditions... their forlorn hopes..." the "appalling situation and the pathetic condition of the backward classes..." Their "low birth", their "demeaning occupation", their "degeneration and deprivation caused by prior and continuing discrimination, exploitation, neglect, poverty, disease, isolation, bondage and humiliation..." "Their roots of origin in the lowest of the low segments of society; their affiliation with what are traditionally regarded as demeaning occupations; their humiliating and inescapable segregation and chronic isolation from the rest of the population; their social and educational deprivation

¹ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, at 609, para 601.

and helplessness; their abysmal poverty and degenerating backwardness..." Classes of citizens that "are incapable of uplifting themselves in order to join the mainstream of upward mobility..."¹

Does any of this describe the Jats of Rajasthan? Does it describe the Vokkaligas and Lingayats of Karnataka? The Reddys and Kammas of Andhra? The Yadavs of U.P. and Bihar? Is any of it a description of the powerful castes who have wrested the title "backwards" in Gujarat?

And yet it is from such descriptions that reservations are justified, indeed from such descriptions that their extension to groups beyond Scheduled Castes and Tribes is justified.

¹Examples of such hyperbole can be multiplied endlessly. These few phrases are from the judgments of Justices Pandian and Thommen in *Indra Sawhney, op. cit.*, at 361, 446, 454; paras 3-4, 280, 295.

And how has the Court come to accept all this?

How have the courts come to accept this wholesale perversion of the scheme of the Constitution? Indeed, as is evident from so many of their pronouncements, how have they come to justify the perversion?

The first problem has been gentlemanliness! The courts have all too often assumed that other limbs of the constitutional structure are responsible, that they are as committed to the Constitution, its values and mores, and that, therefore, for them a hint will be enough. Accordingly, the courts have on occasion left the obvious point unsaid, they have often seemed to have felt that an ambiguity would be sufficient. In fact, those in the Executive as well as legislatures have seized each omission, each ambiguity to press their populism farther.

This can be illustrated by a host of instances – beginning from the very first cases relating to Article 15(1) and Article 16(4) that came before the Supreme Court soon after the Constitution was adopted. There were two of them. Judgments on them were delivered by the same Bench, and it consisted of seven judges, on the same day. *Champakam Dorairajan*, as we have seen, arose because a young girl was denied admission solely because she was from a caste which was other than the castes for which reservations had been made. Her score showed that, but for the fact that she had been born to parents of one caste rather than another, she would have secured the admission. The Supreme Court struck down the Government instructions under which she was denied admission on the ground that they violated Article 15(1) as well as Article 29(2).

B. Venkataramana arose because the petitioner had not secured appointment as a District Munsif solely because he was a Brahmin. Under the old Communal Order, the Madras Government had reserved positions for a series of communities – *Harijans*, Muslims, Christians, Backward Hindus, non-Brahmin Hindus, and Brahmins. It

was admitted on all hands that, like that hapless girl, Venkataramana would have got the position but for the fact that he was a Brahmin. The Court held that as far as the number of seats that had been reserved for *Harijans* and Backward Hindus was concerned, no relief could be given. Article 16(4) enables the State to reserve seats for these categories. If all the vacancies get filled up by these categories, it must be deemed that Venkataramana has not been able to get in, not because he is Brahmin, or because he is of a particular religion, caste or race but because of the necessity of making reservations for the backward classes as permitted by Article 16(4). However, the reservations that had been made for the other categories – that is, categories other than “*Harijans*” and “Backward Hindus” – were manifestly not for the “Backward Classes” permitted by Article 16(4), and, therefore, the exclusion of Venkataramana on account of seats having been filled up by candidates from these other categories was clearly the result only of his being a Brahmin; therefore, to the extent that those reservations blocked Venkataramana out of this latter category of seats, the instructions were unconstitutional.¹

The decisions were clear-cut; their effect was to strike down exclusion of persons either from educational institutions or from government employment on the basis of caste; and, in fact, as we have seen, *Champakam Dorairajan* triggered the move to add a new clause to Article 15. But there was an ambiguity. The lists which had been used in the Communal Order by the Madras Government, at least in as much as they related to Hindus, were based entirely on caste. The Court had not struck down these lists. This was made much of subsequently.²

But things have gone much farther than mere ambiguity – on occasion, they have resulted in a definite resolve *not* to see. Recall that the last time that a Census collected data on a caste-basis was in 1931. Since then no Census has compiled caste-wise data. In a typical case – it was decided in 1972 – the reservations that were at issue were based on data from the 1921 Census. Since 1921 the relative position of castes – their shares in the state’s population, the social, educational,

¹See, *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226; and *B. Venkataramana v. State of Madras*, AIR 1951 SC 229.

²See, *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 662-66, paras 695-697.

economic position – would have been affected by differential rates of growth, by migration, by the differential fortunes of different occupations. But 1921 it was! A sort of survey was conducted by the Commission that had been set up to assess the backwardness of different castes. The Supreme Court itself noted that only 50 per cent of the schools contacted responded to the questionnaire that the Commission sent out. Yet the Court just waived the matter aside: “if only 50 per cent of the institutions sent replies, it is not the fault of the Commission for they could not get more particulars,” it declared.¹ The question was not, “Whose fault is it?” The question was, “Are the data that have been used reliable?” But, “The moving finger writes, and having writ...”

Confronted with the fact that the list that was being advanced for reservations was based entirely on castes, the Supreme Court took comfort by maintaining, “though *prima facie* the list of Backward Classes which is under attack before us may be considered to be on the basis of caste, a closer examination will clearly show that it is only a description of the group following the particular occupations or professions...”² If that was indeed the case, why not refer directly and only to the occupations and professions? After all, the Court has itself so often stressed that there is a fundamental difference between caste and occupation: namely, that, on the Court’s reckoning, one can change one’s occupation but never change one’s caste.

Next, in its refusal to strike down the list that was patently nothing but a list of castes, the Supreme Court held, that from what the concerned Commission had set out “the entire caste is socially and educationally backward and, therefore, their inclusion in the list of Backward Classes is warranted by Article 15(4).” We need not revisit the adequacy of the data, nor the criteria that the particular Commission had used. The question that arises is why the Court has not applied the test to Vokkaligas, Lingayats, Yadavs, Jats..., the very castes which commissions have pointed out are not backward ones, which in fact they have recorded are the ones that oppress the downtrodden in the countryside?

¹See, *State of Andhra Pradesh v. U.S.V. Balam*, (1972) 1 SCC 660, at 681, 686, paras 70, 83-A.

²And this rationalization is quoted for fortification by the majority judgment in *Indra Sawhney. C.f., Indra Sawhney, op. cit.*, at 670, para 710.

And that waiving away an inconvenience, as we shall see, is typical.

Have earlier judgments held that only those classes of citizens whose average is "well below the state average" can be treated as educationally backward and reservations extended to them? Is it the case in the instance at hand that castes have been included which scored *higher* than the state average on the indices which the Court itself finds appropriate in this very case? No matter. In the earlier judgment, says the Supreme Court, the Court "does not propose to lay down any hard and fast rule," that it "has only indicated the broad principles to be kept in view when making the provision under Article 15(4)...." Did the High Court hold that the Commission which had been set up to identify backward castes had "adopted an ingenious method" to overcome the fact that these castes had scored more than the state average on the criteria that the Commission itself had selected? And that, therefore, the Commission had supplemented the results by "personal knowledge" and visits and pronounced them backward nonetheless? No matter: this "personal knowledge" and the visits showed that the living conditions of these castes were "deplorably poor"; therefore, the fact that "the information received from the various schools showed that the percentage of education was slightly higher than the state average" "should not operate to their disadvantage."¹

The Constitution says that no one can be discriminated against only on grounds of caste. Is it the case that, by reserving seats for members of these castes, others – who had actually scored higher than these candidates in the common entrance test – have been excluded only on the ground that they do not belong to these castes? No problem. In a typical passage of the kind that we shall encounter often, the Court, confronted with the fact that the list of groups to whom reservation has been extended is based solely on caste, declares, "It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not *necessarily* mean that caste was the sole consideration and that persons belonging to these castes

¹*State of Andhra Pradesh v. U.S.V. Balram*, (1972) 1 SCC 660, at 686, 689, paras 87, 96.

are also not a class of socially and educationally backward citizens...."¹

Minor P. Rajendran congealed another change, at the least the drift of the judgment enabled activist judges to read a change of great consequence: the Court was later to draw the conclusion that the burden of proof would henceforth lie on the one who challenged a list approved by Government – that *he* must prove that the class/caste as a whole is not backward.²

The word "only"

Underlying that ruling is the typical and foremost dodge. In the Articles that forbid discrimination – Articles 15(1) and (2) and 16(1) and (2) – the judges record, the Constitution says that no one shall be discriminated against "*only*" on grounds of, to stick to our present concern, caste. Hence, if caste is just *one of the factors* that went into determining that a caste is backward; if, for instance, in addition to their caste, the occupation of its members, their educational standing, the religious and social practices of the caste too have been taken into account, then the reservation that is being made for them, and the ground on which others are being excluded from those seats or posts is not "*only* caste". Hence, the reservation is constitutional.

That such constructions are strained should be evident *ex facie*. Turn the matter around. Assume that the discrimination in question is based on *both* caste and religion. It would then not be based *only* on caste. Would it for that reason be immune to challenge in view of the "*only*" in Articles 15, 16 and 29?

The legislative history of the word puts the matter beyond doubt.

The word "*only*" was not in the original Draft. Sir B.N. Rau took it over from Section 298(1) of the Government of India Act, 1935, and, in view of discussions in the Assembly and in the Committee on Minorities, inserted it. Given the use to which the word has since been put to justify caste-based reservations, the illustration he gave to

¹*Minor P. Rajendran v. State of Madras*, (1968) 2 SCR 786, para 7. And that becomes authority in *State of Andhra Pradesh v. P. Sagar*, 1968 AIR 1379; and that becomes redoubled authority in *State of Andhra Pradesh v. U.S.V. Balram*, 1972 SCC (1) 660; and that becomes conclusive authority in *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 752-54, para 59.

²See, for instance, *Indra Sawbney, op. cit.*, at 669, para 706.

explain the reason for introducing the word is indeed instructive. Consider citizens from South Africa, he explained. It may be that the Indian Government may want to put restrictions on them in retaliation for South Africa's policy of apartheid. In the absence of "only" in the Article, someone could object saying that he was being discriminated against on the ground of race. But if "only" is inserted, the person cannot object: the discrimination shall not be *only* on ground of his race – the apartheid policy of South Africa would have been another factor that would have gone into the decision.¹ Moreover, the word would clarify that discrimination on grounds that are not excluded by Articles 15(2) and 16(2) respectively shall be permissible: as Basu notes with reference to relevant cases in his *Commentary*, an inn-keeper may refuse accommodation on the ground, for instance, that the person is intoxicated or that he has an infectious or contagious disease or that he is immoral, etc.²

In *Indra Sawhney*, Justice R.M. Sahai turns to this cover of progressives, and in the process makes an important distinction which sets out the dual function of the word. Is it permissible under the Constitution to discriminate on the basis of caste as long as the discrimination is also based on a few other grounds?, the Judge asks. Is that what the Constitution-makers had in mind?

Justice Sahai explains the dual function of the word "only" in Article 16(2). It is permissive when the State action is founded on grounds other than race, religion or caste; and prohibitive when that action is founded on the grounds mentioned by it, he says. And he gives two telling illustrations from settled cases. Candidates sitting for the IAS examination had to take a compulsory language paper. A notification exempted candidates from some of the Northeastern states. The notification was challenged. The Court upheld it as a linguistic concession. "When it comes to any State action on race, religion or caste etc. the word, 'only' mitigates the constitutional prohibition," Justice Sahai explains. "That is, if the action is not founded, exclusively, or merely, on that which is prohibited then it may not be susceptible to challenge."

¹B. Shiva Rao, *The Framing of India's Constitution, A Study*, Indian Institute of Public Administration, New Delhi, 1968, p. 187.

²*Basu's Commentary on the Constitution of India, Volume B, Articles 14-19*, Sixth Edition, S.C. Sarkar, Calcutta, 1975, p. 295.

Does that mean that the State can take a step based on religion, caste, etc., dress it up with some other considerations and criteria, "with any factor relevant or irrelevant," and be confident that the measure cannot be challenged? Justice Sahai recalls the decision in *State of Rajasthan v. Thakur Pratap Singh*. Additional police had to be stationed in an area because of disturbances. To bring the gravity home to the people, the Government directed that they shall pay for the additional police force. *Harijans* and Muslims, however, were exempted from paying the levy on the ground that persons from these communities had not been guilty of the conduct which had made it necessary to station the additional police in the area. The Court struck down the order. The Government has not been able to show that there are no law-abiding persons in other communities. As they have not been exempted, the exempting of *Harijans* and Muslims has been done "only" on ground of caste and religion, the Court held.

Accordingly, the Judge warned, "Today if Article 16(2) is construed as justifying identification of backward class by equalizing them with those castes in which the customary marriage age is lower or majority of whom are living in *kutchha* houses or a sizeable number is working as manual labour, then tomorrow the identification of backward class amongst other communities where caste does not exist on grounds of race or religion coupled with these very considerations cannot be avoided. That would result in making reservation in public services on communal considerations. An interpretation or construction resulting in such catastrophic consequences must be avoided."¹

But what several progressive judges have done has legitimized the dressing up. From "No discrimination on grounds of caste"; to "No discrimination only on grounds of caste"; to "Although this discrimination is based undeniably on caste, it is valid because factors other than caste too have been taken into account"; to "This discrimination is valid because the fact that the list is only in terms of castes does not *necessarily* imply that other factors have not been taken into account"; to the situation now when, elections in view, a manifestly dominant, powerful caste with money as well as muscle, a caste that owns land, a caste that is wedded to practices that are far

¹*Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, at 602-04, paras 589 to 592.

removed from those associated with the socially backward castes – Jats, say, or Bishnois in Rajasthan, in Madhya Pradesh – is anointed “backward” and conferred entitlement to reservations, no one even bothers to take the matter to courts.

A warning ignored

Justice H.R. Khanna had warned against this very prospect – namely, that the aperture that the Court was providing would only clear the way for governments to decree reservations to castes they wanted to oblige, and then, so as not to fall afoul of the courts and the Constitution, dress up the decision by throwing in a few other indices. Faced, on the one side, with the decision of a Government that had once again extended the time by which members of particular castes may acquire even minimum proficiency, and, on the other, with progressive judges who were finding all sorts of arguments for justifying caste-based decisions, Justice Khanna penned a warning every word of which ought to be read to this day. He first explained that equality of opportunity is a cornerstone of the Constitution, and that it is guaranteed for *all* citizens – “the least deserving as well as the most virtuous”; that “Privileges, advantages, favours, exemptions, concessions specially earmarked for sections of population run counter to the concept of equality of opportunity, they indeed eat into the very vitals of that concept.” He wrote,

What clause (1) of Article 16 ensures is equality of opportunity for all citizens as individuals in matters relating to employment or appointment to any office under the State. It applies to them all, the least deserving as well as the most virtuous. Preferential and favoured treatment for some citizens in the matter of employment or appointment to any office under the State would be antithesis of the principle of equality of opportunity. Equality of opportunity in matters of employment guaranteed by clause (1) of Article 16 is intended to be real and effective. It is not something abstract or illusory. It is a command to be obeyed, not one to be defied or circumvented. It cannot be reduced to shambles under some cloak. Immunity or exemption granted to a class, however limited, must necessarily have the effect of according favoured treatment to that class and of creating discrimination against others to whom such immunity or exemption is not granted. Equality of opportunity is one of the cornerstones of our Constitution. It finds a prominent mention in the Preamble to the Constitution and is one of the pillars which gives support

and strength to the social, political and administrative edifice of the nation. Privileges, advantages, favours, exemptions, concessions specially earmarked for sections of population run counter to the concept of equality of opportunity, they indeed eat into the very vitals of that concept. To countenance classification for the purpose of according preferential treatment to persons not sought to be recruited from different sources and in cases not covered by clause (4) of Article 16 would have the effect of eroding, if not destroying altogether, the valued principle of equality of opportunity enshrined in clause (1) of Article 16.¹

He pointed out that in every case till then the classification-scheme that had been accepted by the Court had been approved on the ground that the basis of differentiation related to the efficiency of administration. He recalled, for instance, the Supreme Court verdict in *Station Masters and Assistant Station Masters Association v. General Manager, Central Railway*,² in which, for promotion, candidates were differentiated between those who had an engineering degree and those who had merely a diploma. Similarly, in another instance the Court had accepted a classification based on some candidates being direct recruits and others being promotees. Under Article 16(1), the Court had not accepted classifications that sought to differentiate persons on the ground that they belonged to two sections of the population.³ He warned,

The proposition that to overdo classification is to undermine equality is specially true in the context of Article 16(1). To introduce fresh notions, of classification in Article 16(1), as is sought to be done in the present case, would necessarily have the effect of vesting the State under the garb of classification with power of treating sections of population as favoured classes for public employment. *The limitation imposed by clause (2) of Article 16 may also not prove very effective because, as has been pointed out during the course of arguments, that clause prevents discrimination on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. It may not be difficult to circumvent that clause by mentioning grounds other than those mentioned in clause (2).*

How prophetic that warning sounds today. And so he counselled that the Court not condone such classification-schemes, for

¹ *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 397, para 210.

² (1960) 2 SCR 311; AIR 1960 SC 384.

³ *State of Kerala v. N.M. Thomas*, *op. cit.*, at 395-96, para 208.

To expand the frontiers of classification beyond those which have so far been recognized under clause (1) of Article 16 is bound to result in creation of classes for favoured and preferential treatment for public employment and thus erode the concept of equality of opportunity for all citizens in matters relating to employment under the State.¹

But these were the years – 1975, 1976 – of a “committed judiciary”. The warning went unheeded. Progressives had their way.

Progressives triumph

It isn't the case, of course, that the judiciary has come to this *cul de sac* in single file. Reviewing the course of contrary decisions, Justice D.A. Desai talked of “the dithering and vacillation on the part of the Judiciary” in this regard, and observed that “a serious doubt is now nagging the jurists, the sociologists and the administrators whether caste should be the basis of recognizing backwardness.”² What has happened is that while every judgment has continued to repeat the formula-words that would satisfy the bare provisions of the Constitution, the scale has been given a tilt that doesn't just condone, it legitimizes caste-mongering.

In the original case, *State of Madras v. Champakam Dorairajan*, which triggered a clause in the first amendment to the Constitution, the Supreme Court struck down the Government's Order on the ground that it was based on caste, religion or race – each and every one of them prohibited by the Constitution. The persons who had been denied admission had been denied it, not because they did not have the academic qualifications for it but simply because they were not of a set of castes. This violates fundamental rights of the persons, the Court held, and these are “sacrosanct and not liable to be abridged by any Legislative or Executive act or order, except to the extent provided in the appropriate Article in Part III.”³

In *M.R. Balaji v. State of Mysore*, the Supreme Court emphasized that social backwardness in the ultimate analysis is the result of poverty, that “The classes of citizens who are deplorably poor automatically become socially backward”; that certain occupations

¹ *Ibid*, at 398, paras 211, 212.

² *K.C. Vasanth Kumar v. State of Karnataka*, AIR (1985) Supp. SCC 714, at 725, 729, paras 7, 20.

³ *State of Madras v. Champakam Dorairajan*, AIR (1951) SC 226.

too may contribute to making persons following them socially backward; that, therefore, economic backwardness and criteria such as occupation and habitation are much more reliable criteria for determining backwardness. It recognized that caste could be a relevant factor, but stressed that under no circumstances must it be made the sole or even the dominant test. The Court gave additional reasons for shunning caste as the sole or dominant criterion. Doing so, it said, "may not always be logical and may perhaps contain the vice of perpetuating the castes themselves." Moreover, there are groups in religions that have forsworn caste – like Islam and Christianity – which may be as deserving of help as the specified castes among Hindus.¹

The matter was put to the test again in *Chitralekha*. Justice Subba Rao put the criteria beyond doubt. He recalled what Justice Gajendragadkar had written in *M.R. Balaji*, and the reasons, other than the fundamental one of the explicit provisions of the Constitution, that had been spelt out in that case. Justice Subba Rao said that while caste may be "a relevant circumstance" for ascertaining backwardness in certain instances, if an authority could identify backwardness without reference to caste that identification would be valid.

In addition to the reasons that had been given in *M.R. Balaji*, Justice Subba Rao pointed out two factors on account of which also caste ought not to be used as the sole or dominant criterion. He recalled that these provisions had been made in the Constitution to lift the educationally and socially backward in our society "but not to give weightage to progressive sections of our society under the false colour of caste to which they happen to belong." Article 15(4) speaks of "classes" not "castes", he pointed out. "If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and the Scheduled Tribes," he declared. "Though it may be suggested that the wider expression 'classes' is used in clause (4) of Article 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution to use the

¹*M.R. Balaji v. State of Mysore*, AIR (1963) SC 649.

expression 'Backward classes or castes'. The juxtaposition of the expression 'Backward Classes' and 'Scheduled Castes' in Article 15(4) leads to a reasonable inference that the expression 'classes' is not synonymous with castes."

It is only this interpretation that would avoid the anomaly that would arise if the two expressions are equated, he stressed. "It [keeping to the expression used in the Constitution, 'classes', and keeping it apart from 'castes'] helps the really Backward Classes instead of promoting the interests of individuals or groups who, [though] they belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced." "To illustrate," he continued, "take a caste in a state which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, an effective minority may be socially and educationally far more advanced than another small sub-caste the total number of which is far less than the said minority. If we interpret the expression 'classes' as 'castes', the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve."

Hence, he concluded, while caste may be taken into account "under no circumstance a 'class' can be equated to a 'caste'...." "We would also make it clear," he added for good measure, "that if in a given situation caste is excluded in ascertaining backwardness within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfies other tests."¹

The Government of Jammu and Kashmir decreed that half the Gazetted posts that were to be filled by promotion would be reserved for Muslims. The order came to the Supreme Court. The argument that was advanced was that Muslims were under-represented in the services of the state, and, as mandated by Article 16(4), the Government had the authority to, indeed was in duty bound to reserve posts for them to make sure that they were adequately represented. In *Triloki Nath*, the Supreme Court stated decisively that the expression "backward classes" is not synonymous with

¹*Chitrallekha v. State of Mysore*, AIR (1964) SC 1823, at 1832-34, in particular paras 14-21.

"backward castes" or "backward communities". It struck down the rationalization that the Government of J&K had advanced, and reaffirmed that any classification based solely or predominantly on caste, community, race, religion, descent, place of birth, etc. flew in the face of specific provisions of the Constitution. "Caste as a basis for determining backwardness received a rude jolt," Justice D.A. Desai noted.

In *Periakaruppan*, the Supreme Court was faced with an instance in which students who had admittedly had "brilliant" records were denied admission as seats were reserved for members of some castes. The Court made three important points – one of which was to survive in subsequent rhetoric; one was forgotten completely; and one was to be cited for its operational implication, as it was a handy observation for caste-based reservations.

The Court first pointed to the fact that it was in the long term interests of the country that backward classes also be lifted:

Undoubtedly we should not forget that it is against the immediate interest of the Nation to exclude from the portals of our Medical Colleges qualified and competent students but then the immediate advantages of the Nation have to be harmonised with its long range interests. It cannot be denied that unaided many sections of the people in this country cannot compete with the advanced sections of the Nation. Advantages secured due to historical reasons should not be considered as fundamental rights. Nation's interest will be best served – taking a long range view – if the backward classes are helped to march forward and take their place in line with the advanced sections of the people.¹

The moot question related to the criteria by which the backward classes were to be identified. Reviewing the judgment, Justice D.A. Desai observed, "It is difficult to make out whether the Court accepted caste as the sole basis for determining social and educational backwardness." That is so because, while repeating what had been held in the earlier judgments, in *A. Periakaruppan*, the Court also observed that "A caste has always been recognized as a class." And that in the country there are castes that are socially and educationally backward. "To ignore their existence is to ignore the facts of life,"

¹*A. Periakaruppan (Minor) v. State of Tamil Nadu*, (1971) 1 SCC 38, at 46-47, para 21.

it said. These are the observations that came to be picked up from this judgment. That to ignore that to base ameliorative measures on the criterion of caste would perpetuate the very evil that the Constitution aims to eradicate would also be to ignore the facts of life – this the Court did not examine.

Even in this judgment, the Court did point to a vital consideration that it said must be borne in mind while decreeing reservations. Even as it pointed out that the facts of life cannot be ignored, it emphasized,

But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest.

And in this context it pointed to a telling empirical fact:

The fact that candidates of backward classes have secured about 50% of the seats in the general pool does show that the time has come for a *de novo* comprehensive examination of the question. It must be remembered that the Government's decision in this regard is open to judicial review.¹

That was *thirty-five years* ago. Put that prescription alongside the following facts that *The Hindu* reported recently. On 23 August, 2004, the paper reported that of the total 1,224 seats in 12 government medical colleges, 952, that is 77.9 *per cent* have been taken by Backward Class and Most Backward Class students. They have scored so well as to capture each of the first 14 ranks. Students from castes which did not have reservations were able to secure just 2.3 per cent of the seats. In the top 100 ranks, the non-reserved castes, candidates got just six places. The Backward Class candidates got 79 of the places, and the Most Backward Class candidates bagged 13. Of the first 400 ranks, only 31 were from the non-reservation castes.²

¹ *Ibid*, at 49, para 29.

² <http://www.hinduonnet.com/thehindu>; date 4/24/2006.

But who recalls that prescription today? Who dares suggest that in view of evidence of this kind, which suggests that the reservationists have overcome their handicaps, the policy of reservations should be reviewed?

In fact, such prescriptions of the Court have been ignored totally. All that is cited from a case such as *A. Periakaruppan (Minor)* are those two observations – “A caste has always been recognized as a class,” and “There is no gainsaying the fact that there are numerous castes in the country which are socially and educationally backward. To ignore their existence is to ignore the facts of life.”

Even in *Soshit Karamchhari Sangh*, the Court observed,

If freedom, justice and equal opportunity to unfold one's own personality belong alike to *bhangi* and Brahmin, prince and pauper, if the *panchama* proletariat is to feel the social transformation Article 16(4) promises, *the State must apply equalizing techniques which will enlarge their opportunities and thereby progressively diminish the need for props. The success of State action under Article 16(4) consists in the speed with which result-oriented reservation withers away as no longer a need, not in the everwidening and everlasting operation of an exception (Article 16(4)) as if it were a superfundamental right to continue backward all the time. To lend immortality to the reservation policy is to defeat its raison d'etre; to politicize this provision for communal support and Party ends is to subvert the solemn undertaking of Article 16(1); to casteify 'reservations' even beyond the dismal groups of backward-most people, euphemistically described as SC&ST, is to run a grave constitutional risk. Caste, ipso facto, is not class in a secular State.*¹

That was in *Soshit Karamchhari Sangh*.

Twenty-five years ago.

What was to be a temporary expedient has become a permanent feature. What was to be a concession for a few has become the right of vast multitudes, a right they wrest by might. What was to be a facility made available to the extent that this could be done consistently with the efficient functioning of the State has been debased to the point that it now bears no resemblance at all to what the Constitution had intended.

¹*Akhal Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India*, (1981) 1 SCC 246, at 264, para 22.

The scales are tilted

But to proceed, by *U.S.V. Balram*, the scale had begun to tilt visibly. A caste is a class, the Supreme Court said. Examining the judgment and the data which the Court had considered in the case, Justice Desai observed, "The assumption that all the members of a given caste are socially and educationally backward is wholly unfounded and lacks factual support obtained by survey." He could have put the point in stronger words for the Court had held that, if the caste as a whole is backward, notwithstanding the fact that some members of it are both socially and educationally advanced, to characterize it as backward is valid. Indeed, the data before the Court showed clearly that some sections of the caste that had been characterized as backward were placed even higher than the state average. The Court had brushed that fact aside: "No doubt there are [a] few instances where the educational average is slightly above the State average, but that circumstance by itself is not enough to strike down the entire list. In fact, even there it is seen that when the whole class in which that particular group is included, is considered, the average works out to be less than the State average. Even assuming there are [a] few categories which are [a] little above the State average, in literacy, that is a matter for the State to take note of and review the position of such categories of persons and take a suitable decision."¹

Notice in passing a device here: how in some cases judges convince themselves that they have a duty to intervene, even to the extent of giving directions on administration, and how in others – as in the one we are considering – they shrug off matters that fall in the heart of the question that is before them "for the State to take note of... and take a suitable decision."

The following year, the scale was tilted almost completely in the direction that the "caste-is-class" school advocated. Recall that in *M.R. Balaji*, the Supreme Court had held that social and educational backwardness are ultimately due to poverty, and that, therefore, economic criteria are the best indices of backwardness. In *Janki Prasad Parimoo*, the Court put the balance the other way. Mere poverty cannot be the test, it said, because in India, except for a small

¹*State of Andhra Pradesh v. U.S.V. Balram*, (1972) 1 SCC 660, at 685-86, para 83.

proportion, the people are all poor. To qualify for the assistance that is envisaged by the Constitution, the group must be both socially and educationally backward. Now, it is true, the Court allowed that "In India social and educational backwardness is further associated with economic backwardness and it is observed in *Balaji* case... that backwardness, socially and educationally, is ultimately and primarily due to poverty." "But if poverty is the exclusive test," the Court now maintained, "a very large proportion of the population in India would have to be regarded as socially and educationally backward, and if reservations are made only on the ground of economic considerations, an untenable situation may arise. Even in sectors which are recognized as socially and educationally advanced, there are large pockets of poverty." The task of an investigator is not just to identify the poor, but to go further and ascertain who, among the poor, are also socially and educationally backward. On this reasoning, the Court struck down some of the groups that the Committee set up for the purpose had identified as qualifying for special assistance. The reasoning by which it did so is what is important for our present concerns.

The Committee had proceeded on the criterion that cultivators with holdings less than 10 *kanals* were backward. The Court said this would lead to anomalies: "If a cultivator holds 10 *kanals* of land or less he is to be regarded as backward, i.e. to say socially and educationally backward. But, if his own brother living in the same village owns half a *kanal* more than the ceiling, he is not to be considered backward. This completely distorts the picture. It will be very difficult to say that if a person owns just 10 *kanals* of land, he should be considered socially and educationally backward while his brother owning half a *kanal* more should not be so considered."

That observation is a bit odd, as it would be true of any cut-off line that anyone, including the Court, would choose. The sentence that followed was even more consequential for the future – "The error in such a case lies in placing economic consideration above considerations which go to show whether a particular class is socially and educationally backward." That put paid to *M.R. Balaji* and similar rulings.

The Committee, and following it the Government of J&K, had identified pensioners who received less than Rs. 100 per month as

backward. The Court rejected this category too saying that in their case "The same error is repeated." Moreover, they do not constitute a homogenous group, it reasoned. Do read the reasoning on which the Court decided that these sections do not constitute a "class", and apply that very reasoning to the caste after caste which the same Court has time and again accepted to be a "class". The Court observed,

It is difficult to say that these pensioners are a class in the sense that they are a homogeneous group. They are an amorphous section of Government servants who by the *accident* of receiving Rs 100 or less as pay at the time of retirement or being ex-servicemen of certain grades are pushed into *an artificially created body*. It may be that they belong to Class IV or similar grade service of the State. But that is not the test of their social and educational backwardness. In days when sources of employment were few, many people though socially advanced might have accepted low paid jobs. Some of them may have failed to make the educational grade and were hence forced by necessity to accept such low paid jobs. Some others might have prematurely retired from posts carrying the scale referred to above. The accident, therefore, that they belong to a section of Government servants of certain category is no test of their social backwardness.

With that, the Court was back, *via* the brother, to its argument about the dividing line:

The test breaks down if the position of a brother of such a pensioner is considered. If the brother, also a Government servant, has the misfortune of retiring when holding a post the maximum of which was Rs. 105 he was liable to be regarded as not socially and educationally backward when, in all conscience, so far as the two brothers are concerned they remain on the same social level. Another brother who is privately employed and retires from service without any pensionary benefits would not be entitled to be classed as backward under the test. The anomalies arise because of the artificial nature of the group created by the Committee. If all the brothers are socially and educationally backward, you will be differentiating between them by calling some more backward and others less backward....¹

In other cases, from even among the ones considered in this volume, the Court insists on focusing on actuals only; it forswears

¹*Janki Prasad Parimoo v. State of J&K*, (1973) 1 SCC 420, at 434, 438-40, paras 22, 24, 34-36.

"hypotheticals"; and that focus on the facts that are before it is used as precedent in subsequent rulings. And here? Such bifocals apart, such reasoning of this kind would call in question, and that is exactly what it did, any and every economic criterion – for, adjudged by an economic criterion like income or assets or calorie-intake, persons would fall along a continuum, and *any* dividing line anyone draws would be open to the objection, "Consider his brother...." The only criterion that would survive would be a criterion like caste – you are either in one caste or not. And so are your brothers. And, at least on the assertions of many a judge, you will never be able to climb out of it.

That regressive consequence is bad enough. There is another fact to consider: does that kind of criterion-*via*-the-brother not break down on exactly the same reasoning? After all, as the Court reasoned, the requirement of Articles 15(4) and 16(4) is to identify socially and educationally backward classes. It is entirely possible that though two brothers belong to the same caste by virtue of their birth, one of them has studied, prospered and is now looked up to in their social circle, and the other has remained ill-lettered, and continues to be placed in the position in which his caste is held. The former is no longer "socially and educationally backward", the latter surely is. Hence, is the caste any more reliable than the size of holding or the level of pension?

Similarly, read the observations by which the Court concludes that pensioners though of one grade – say, Grade IV – are not a homogeneous group. And assess whether any caste designated as "backward" is a homogeneous group. How come the Supreme Court struck down pensioners as a category but has accepted these interminable lists of castes?

In any event, on good reasoning or not, the scales had been tilted away from economic criteria.

Warnings brushed aside

Caste became *de rigueur*. Some judges, of course, continued to warn that using caste as the basis of classification would only perpetuate the very evil that the progressives were wailing against, and to counsel that all concerned shift to economic criteria.

In *Vasanth Kumar*, Justice A.P. Sen forcefully pointed out that both because of necessity as well as because of the commitment that had been made in the Constitution, the socially and educationally backward must be helped. "But unfortunately the policy of reservation hitherto formulated by the Government for the upliftment of such socially and educationally backward classes of citizens is caste oriented," he said, "while the policy should be based on economic criteria." He emphasized two considerations in particular why this should be so. First, he said, only if this were done could caste be removed while making special provisions under Articles 15(4) and 16(4). Second, he said, "At present only the privileged groups within the backward classes reap all the benefits of such reservation with the result that the lowest of the low who are stricken with poverty and are therefore socially and educationally backward remain deprived though these constitutional provisions under Articles 15(4) and 16(4) are meant for their advancement."

Therefore, he said, the present caste-based criteria should be replaced by a two-step process. In the first instance, gauge the poverty of the person. Second, assess him by some direct measures of social and educational backwardness. And, he added, a point the significance of which we shall soon see, "caste and subcaste should be used only for purposes of identification of persons comparable to Scheduled Castes and Scheduled Tribes."¹

Justice D.A. Desai was equally forthright. "This over-simplified approach [of looking at caste and deducing backwardness, etc.] ignored a very realistic situation existing in each caste, that every such caste whose members claim to be socially and educationally backward, has well-placed segments... In fact, upper crust of the same caste is verily accused of exploiting the lower strata of the same caste." He recalled how the Rane Commission appointed by the Gujarat Government had come to "an irrefutable conclusion" that among the castes that were agitating to be recognized as backward only the lower-income groups were socially and educationally backward.² "The assumption that all members of some caste are equally socially

¹*K.C. Vasanth Kumar v. State of Karnataka*, AIR (1985) Supp. SCC 714, at 769-70, paras 82, 84.

²*Ibid*, at 729, 731, paras 20, 22.

and educationally backward is not well founded," he said, reviewing the findings of commissions and committees. "...It is recognized without dissent that the caste based reservation has been usurped by the economically well placed section in the same caste," he pointed out, and cited a case that he had himself to deal with in the Punjab High Court where he saw how "the labeled weak exploits the really weaker." A little later, he stressed again, "Reservation in one or other form has been there for decades. If a survey is made with reference to families in various castes considered to be socially and educationally backward, about the benefits of preferred treatment, it would unmistakably show that the benefits of reservations are snatched away by the top creamy layer of the backward castes. This has to be avoided at any cost."¹

The Judge cited with approval the findings of the sociologist, I.P. Desai who argued that "if the State accepts caste as the basis for backwardness, it legitimizes the caste system which contradicts secular principles, and, secondly, traditional caste system has broken down and contractual relationships between individuals have emerged." The Constitution has envisaged a casteless, classless society, Justice Desai stressed. "In order to set up such a society, steps have to be taken to weaken and progressively eliminate caste structure," he added. "Unfortunately, the movement is in the reverse gear. Caste stratification has become more rigid to some extent, and where concessions and preferred treatment schemes are introduced for economically disadvantaged classes, identifiable by caste label, the caste structure unfortunately received a fresh lease of life. In fact there is a mad rush for being recognised as belonging to a caste which by its nomenclature would be included in the list of socially and educationally backward classes."

To illustrate what was happening as a result of these caste-based reservations, Justice Desai pointed to the pressures that were put on the Bakshi Commission in Gujarat and the Mandal Commission for including ever larger number of castes in the backwards' list. The Gujarat Government had been forced as a result to appoint a second Commission, the Rane Commission. This Commission "took note of the fact that there was an organised effort for being considered socially and educationally backward castes," so much so that "some

¹*Ibid*, at 733-35, paras 25, 28.

of the castes just for the sake of being considered as socially and educationally backward, have degraded themselves to such an extent that they have no hesitation in attributing different types of vices to and associating other factors indicative of backwardness with their castes." The perversion was such that the Commission had devised criteria other than caste to gauge backwardness.¹

Justice Desai stressed, "If State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimize and perpetuate the caste system. It does not go well with our proclaimed secular character as enshrined in the Preamble to the Constitution." He, therefore, urged that the country abandon caste as the criterion for assessing backwardness, that it adopt poverty as the criterion and thereby strike at the root of both – the caste system as well as poverty.

And finally, Justice Desai pointed to a vital truth: "Reservation must have a time span," he stressed, "otherwise concessions tend to become a vested interest."²

In his brief, "skeletal" observation, Justice Y.V. Chandrachud also gave counsel to the same effect. While the existing practice may be continued for fifteen years, he wrote, after that period reservations must be regulated by a means test. Second, this means test must apply to the Scheduled Castes and Tribes also. As for Other Backward Classes, a twin test must be applied: only those sections must be considered for reservations whose condition is comparable to that of Scheduled Castes and Tribes; and, within the groups that qualify on this criterion, the means test must be applied. Finally, the policy of reservations must be reviewed every five years or so.³

All to no avail.

Strained history

Justice E.S. Venkatramaiah maintained that "the expression 'backward classes' used in the Constitution referred only to those who were born in particular castes, or who belonged to particular races or tribes or religious minorities which were backward."

¹*Ibid*, at 732, para 24.

²*Ibid*, at 733-36, paras 25, 30, 31.

³*Ibid*, at 723, para 2.

His reasoning is most instructive in that it shows the lengths to which a judge can go to reach a conclusion he has chosen to reach. To fathom the meaning of "socially and educationally backward classes" in Articles 15(4) and 16(4), he turns to the way the Articles – 338 and 340 – came to be formulated by which seats were reserved for Scheduled Castes and Tribes in legislatures. This subject – of reservations in legislatures – had been entrusted to the Committee on Minorities, and the part – XVI – in which they were listed in the Draft Constitution was entitled, "Special Provisions Relating to Minorities". The relevant Articles were eventually passed with the amendment that wherever the word "minorities" occurred in Part XVI, the words "certain classes" should be substituted. He reasons that there are two significant aspects to this usage.

First, that "the expression 'backward classes' used in Part XVI of the Constitution and in particular in Article 338(3) is used along with the Scheduled Castes, the Scheduled Tribes and the Anglo-Indian community." "The meaning of backward classes has, therefore, to be deduced having regard to the other words preceding it," he says. Because, he explains, "It is a rule of statutory construction that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified." Second, he adds a while later, "the word 'classes' was substituted in the place of the word 'communities' by the Constituent Assembly just at the last moment." He also recalls a subsequent speech in Parliament of Dr. Ambedkar to the effect that backward classes are "nothing else but a collection of certain castes."¹

Consider the "reasons" in turn.

As for specific words occurring after general words, should we not infer that, as the words "backward classes" are followed by the words "Scheduled Castes and Scheduled Tribes," to be identified as a "Backward Class", the condition of the group must be akin to and as steeped in privation as that of Scheduled Castes and Tribes? That has important policy implications. But we shall soon see how so many of the judges balk at that conclusion.

In any event, does the very fact that one set of words is used and not the other, and that too in such close proximity, not signify that

¹*K.C. Vasanth Kumar v. State of Karnataka*, *op. cit.*, at 787-95, paras 110-119.

the Constitution makers wanted us to make sure that we thought of an entity *different from* the latter set? Recall what Justice Subba Rao pointed out in this very context: nothing prevented the framers from using “castes” instead of “classes”. Moreover, the expression “socially and educationally backward classes” is very specific by itself: why does it need to be clarified by words before or after it? A class that is backward both socially and educationally – what is so vague about the expression that its meaning must be clarified by importing “castes” from the neighbourhood?

Identical questions arise in regard to Justice Venkataramiah’s observation that the substitution was made “just at the last moment”. The substitution *was* made – that is the first point, and it should lead us to realize that one entity and *not* the other is meant. Second, that it was made even though “just the last moment” was left, *redoubles* the reason for us to realize that the framers were serious to have us identify an entity different from the one we would have identified from the earlier expression. Furthermore, the expression “socially and educationally backward classes” occurs in other parts of the Constitution also – parts that have a legislative history very different from Part XVI on which the Judge has chosen to focus. Why should we not infer its import by looking up other words used to specify the groups for which special measures are to be taken? “Socially and backward classes of citizens” in Articles 15 and 16, not castes; “weaker sections of the people” in Article 46, not castes.

And how valid is Justice Venkataramiah’s inference that this change was made just “at the last moment”? The least that one can say is that the assertion that the word “backward” was put in “at the last moment” is indeed surprising, all the more so as it falls from an academically inclined Judge. Even a cursory glance through successive drafts of the Article, the discussions in the committees, the proposals of members on the draft text, the observations of the Constitutional Advisor on those proposals discloses that the words of this Article went through as much scrutiny and exchange as of other parts of the Constitution. Once the draft was circulated, one member wanted the Constitution to guarantee that there would be no discrimination not just in “public employment” but also in employment in any enterprise. Another cautioned against the affirmative assurance that had been written into the text, and warned

that it would spawn heaps of litigation. Others debated the impact the words would have on provisions that already existed in different provinces and princely states. Ambedkar wanted the decision of the Executive in this regard to be made non-justiciable. Another member advocated that reference be made to "minorities". Still another proposed enlarging the scope beyond governmental employment and encompassing "occupation, trade, business or profession". Several members advanced rival proposals regarding the word "backward". Was it necessary at all? Should it be accompanied by "economically or culturally"? Should it be accompanied by "Scheduled Castes"? Should there be a reference in addition to persons who reside in a state?...¹ In view of all this, patent as it is from the published record, how can one make light of the word on the ground that it was sort of slipped in "at the last moment"?

As for Dr. Ambedkar saying something subsequently in Parliament, he also told Parliament on 2 September 1953, "People always keep saying to me: 'O, you are the maker of the Constitution.' My answer is I was a hack. What I was asked to do, I did much against my will... Sir, my friends tell me that I have made the Constitution. But I am quite prepared to say that I shall be the first person to burn it out. I do not want it. It does not suit anybody..." Should we go by that also? Or by his "explanation" a few days later – that the Constitution had been a good temple but that it had since been taken over by *asuras*, and that is why he had said that it should be burnt down?

Reasons examined

Justice Venkataramiah also gave two minor reasons for taking "classes" to mean "castes". For one thing, it is caste that is pervasive as well as durable in India. He quoted the Backward Classes Commission Report to the effect that "The Brahmin taking to tailoring does not become a tailor by caste. A Brahmin may be a seller of boots and shoes, and yet his status is not lowered thereby." Surely, the answer to the opposite question tells us as much about India today: when a person who was born into a caste that has been enumerated in a Schedule becomes a journalist or an IT professional or a film

¹For a summary account, see Shiva Rao, *The Framing of India's Constitution, A Study*, Indian Institute of Public Administration, New Delhi, 1968, pp. 192-200.

star or a cricket player, is he looked upon as someone from a caste or as a journalist/IT professional/film star/cricket star? The even more important consideration while designing policies to help lift him is, "Should ameliorative measures be designed so that they erase the stigma of caste or reinforce it?" The Judge is not detained by any consideration of this kind.

Finally, Justice Venkataramiah argues, when caste is not taken into account, anomalies erupt. He recalls the judgment of the Supreme Court itself in *State of Uttar Pradesh v. Pradip Tandon*¹ to illustrate the point. The U.P. Government had announced two kinds of reservations – for those who had been born in rural areas on the ground of poverty, and for those from the Uttarakhand region as the areas themselves were backward. The Supreme Court struck down the former – 80 per cent of the population cannot be a homogeneous group, it reasoned. It upheld the latter – the region is manifestly backward, the Court reasoned, it lacks development, communications, literacy.

Justice Venkataramiah says that the judgment suffers from an "inherent inconsistency" between these two parts: rural areas as well as Uttarakhand are regions; reservations for one have been struck down, reservations for the other have been upheld. The anomaly would not have arisen had the Government or, later, the Court taken caste into consideration. If castes that are backward had been specified, reservations in both rural areas and Uttarakhand would have been consistent with the requirements of the Constitution.² The inadequacy of this prescription becomes at once apparent when we consider a region like the Northeast in which caste does *not* figure the way it does in U.P. and Bihar. Would the "inconsistency" have been cured by specifying the reservations in terms of caste? On the other side, would caste consciousness and caste politics not have been injected into a pristine area by doing so? Moreover, isn't there a direct way of removing that "inherent inconsistency"? Would it not automatically disappear if a direct economic test were used for determining backwardness?

¹(1975) 1 SCC 267.

²*K.C. Vasanth Kumar v. State of Karnataka, op. cit.*, at 796, 799-800, paras 122, 128-31.

A vital prescription ignored

Such are the reasons by which even an academically inclined Judge tried to establish that "class" meant "caste". But he added an all important caveat, one which, as we shall see, has been totally obscured in the ensuing years. As others had before him, Justice Venkataramiah pointed out that, even as backward classes are taken to mean backward castes, unless the restriction is introduced that only those castes would be given reservations as OBCs whose condition is similar to that of the Scheduled Castes and Tribes, "it would become possible for the Government to call any caste or group or community which constitutes a powerful political lobby in the state as backward even though in fact it may be an advanced caste or group or community but just below some other forward community." Unless reservations are restricted in this way, "the benefit of reservation would invariably be eaten up by the more advanced sections," and "in that event the whole object of reservation would become frustrated."

On the other hand, if such a restriction is adopted, "it will not only reduce the number of persons who will be eligible for the benefits under Article 15(4) and Article 16(4)... at the same time it will also release the really backward castes, groups and communities from the stranglehold of many advanced groups which have had the advantage of reservation along with the really backward classes for nearly three decades." "It is time that more attention is given to those castes, groups and communities who have been at the lowest level suffering from all the disadvantages and disabilities (except perhaps untouchability) to which many Scheduled Castes and Scheduled Tribes have been exposed but without the same or similar advantages that flow from being included in the list of Scheduled Castes and Scheduled Tribes," the Judge said.

Accordingly, Government should, in addition to caste, incorporate a means test, and accord reservation on the basis of three inter-related criteria: the condition of the caste group should be similar to that of the Scheduled Castes and Tribes; within that group, those who qualify by a means test should be eligible; and the caste group should be inadequately represented in the services of the State.¹

¹*Ibid*, at 807-08, paras 142, 143.

Reality to the rescue

For the truly progressive judge, of course, all this is too hedged-in, it is apologetic. He does not strain himself the way a Justice Venkataramiah does. He "goes for the substance not the words"!

In *Vasanth Kumar*, Justice O. Chinnappa Reddy commences his judgment with an observation that would lead anyone to conclude that the basis for the reservation policy, that is caste as the criterion for classification, must be abandoned and another adopted. The Judge writes,

Over three decades have passed since we promised ourselves "justice, social, economic and political" and "equality of status and opportunity". Yet, even today, we find members of castes, communities, classes or by whatever name you may describe them, *jockeying for position, trying to elbow each other out, and, vying with one another to be named and recognised as "socially and educationally backward classes"*, to qualify for the 'privilege' of the special provision for advancement and the provision for reservation that may be made under Articles 15(4) and 16(4) of the Constitution. The paradox of the system of reservation is that *it has engendered a spirit of self-denigration among the people*. Nowhere else in the world do castes, classes or communities queue up for the sake of gaining the backward status. Nowhere else in the world is there competition to assert backwardness and to claim "we are more backward than you." This is an unhappy and disquieting situation, but it is stark reality. Whatever gloss one may like to put upon it, it is clear from the rival claims in these appeals and writ petitions that the real contest here is between certain members of two premier (population-wise) caste-community-classes of Karnataka, the Lingayats and the Vokkaligas, each claiming that the other is not a socially and educationally backward class and each keen to be included in the list of socially and educationally backward classes. To them, to be dubbed a member of the socially and educationally backward classes is a passport for entry into professional colleges and State services; so they jostle with each other and in the bargain, some time they keep out and sometimes they usher in some of those entitled to legitimate entry, by competition or by reservation....¹

But isn't that exactly what the critics of basing reservations on caste had predicted all along would happen? Is the precise situation that

¹ *K.C. Vasanth Kumar v. State of Karnataka*, *op. cit.*, at 736, para 32.

the Judge is depicting not a compelling argument for basing special measures on criteria other than caste? Does the persistence of such invidious distinctions and pursuits after decades of caste-based reservations not suggest that this way of dealing with the problem has failed, and should be replaced?

Justice Chinnappa Reddy's inference, however, is the opposite. The reason for it can be gleaned in the gentle hint that Justice H.R. Khanna gave in *N.M. Thomas*: "the doctrinaire approach". The empirical rationale for sticking to that approach perhaps lies in the words that Justice Reddy uses: "This is an unhappy and disquieting situation, but it is stark reality...."

Judges apart, that is the central proposition of progressives throughout: their ideology compels them to treat caste as regressive; they have poured venom on Hinduism asserting that it has spawned this oppressive, reactionary compartmentalization of human beings; but their politics is as caste-based as that of anyone else. How are they to reconcile the two? How are they to adopt and embrace, and rationalize embracing that reactionary compartmentalization? By putting the blame on "stark reality"! "This is an unhappy and disquieting situation, but it is stark reality...."

"Social status and economic power are so woven and fused into the caste system in Indian rural society that one may, without hesitation, say that if poverty be the cause," Justice Chinnappa Reddy writes, "caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person's caste..."¹ And again, "there is an over-powering mutuality between poverty and caste on the Indian scene..."² So pervasive is caste in Indian society because of Hinduism that it is present even in religions that eschew it – Sikhism, Christianity, Islam...

That asserted, the Judge tosses out the proposition that the condition of castes which are selected for reservations under the rubric "other socially and educationally backward classes" should be akin to that of Scheduled Castes and Tribes. True, earlier judgments contain admonitions to this effect, he allows. But, contrary to what is apparent from the face of the text of the judgments, he declares, "We

¹*Ibid*, at 742, para 40.

²*Ibid*, at 748, para 52.

do not think that these observations were meant to lay down any proposition that the socially backward classes were those classes of people, whose conditions of life were very nearly the same as those of the Scheduled Castes and Tribes."

The reasons he gives are instructive – we have in them yet another instance of rationalizations for conclusions decided *a priori*. "We say so first because of the inappropriateness of applying the ordinary rules of statutory interpretation to interpret constitutional instruments which are *sui generis* and which deal with situations of significance and consequence," the Judge begins. "It is not enough to exhibit a Marshallian awareness that we are expounding a Constitution; we must also remember that we are expounding a Constitution born in the mid-twentieth century, but of an anti-imperialist struggle, influenced by constitutional instruments, events and revolutions elsewhere, in search of a better world, and wedded to the idea of justice, economic, social and political to all." "Such a Constitution must be given a generous interpretation," he says, "so as to give all its citizens the full measure of justice promised by it. The expositors of the Constitution are to concern themselves less with mere words and arrangement of words than with the philosophy and the pervading 'spirit and sense' of the Constitution, so elaborately exposed for our guidance in the Directive Principles of State Policy and other provisions of the Constitution." Restricting the benefits of reservation in the manner suggested would leave out many castes, he apprehends:

Now, anyone acquainted with the rural scene in India would at once recognise the position that the Scheduled Castes occupy a peculiarly degraded position and are treated, not as persons of caste at all, but as outcastes. Even the other admittedly backward classes shun them and treat them as inferior beings. It was because of the special degradation to which they had been subjected that the Constitution itself had to come forward to make special provision for them. There is no point in attempting to determine the social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally backward classes other than Scheduled Castes and Tribes.

Notice the mode and sequence of reasoning: not, "This is the criterion; hence, groups A and B should be given reservations, groups

X and Y should not"; instead, "Groups X and Y must be given reservations, hence this should not be the criterion."

By restricting the benefit, the criterion would only enable the existing patterns of domination to be perpetuated, the Judge says: "Such a test would perpetuate the dominance of the existing upper classes. Such a test would take a substantial majority of the classes who are between the upper classes and the Scheduled Castes and Tribes out of the category of backward classes and put them at a permanent disadvantage. Only the 'enlightened' classes will capture all the 'open' posts and seats and the reserved posts and seats will go to the Scheduled Castes and Tribes and those very near the Scheduled Castes and Tribes. The bulk of those behind the enlightened' classes and ahead of the near Scheduled Castes and Tribes would be left high and dry, with never a chance of improving themselves."¹

In a word, the object of the revolutionary Constitution is to overturn and end the old and cruel system of domination. This can only happen if we build on existing "stark reality" and accept caste as the basis of reservation; but simultaneously extend the benefit of reservation to a large enough number of castes which are not as disadvantaged by that cruel system as the Scheduled Castes and Tribes.

But why not opt for poverty and other, "secular" indices of deprivation? "The idea that poor Brahmins may also be eligible for the benefits of Articles 15(4) and 16(4) is too grotesque even to be considered," says Justice Chinnappa Reddy. Does the subjective revulsion of the Judge – "...too grotesque even to be considered" – qualify as a reason in law? "Similarly, no one can possibly claim that the Patels of Gujarat, the Kayasthas of Bengal, the Reddys and Kammas of Andhra Pradesh are socially backward classes, despite the fact that the majority of them may be poor farmers and agricultural labourers. In the rural, social ladder they are indeed high up and despite the economic backwardness of sizeable sections of them, they cannot be branded as socially backward...."² And that's it.

The Judge gives one further argument for shunning economic criteria – the powerful will manipulate it, he says. To recall his words,

¹*Ibid*, at 748, para 51.

²*Ibid*, at 768, para 79.

How is one to identify the individuals who are economically backward, and, therefore, to be classified as socially and educationally backward? Are all those who produce certificates from an official or a legislator or some other authority that their family incomes are less than a certain figure to be so classified? It should be easy to visualise who will obtain such certificates. Of course, the rural elite, the upper classes of the rural areas who don't pay any income tax because agricultural income is not taxed. Who will find it difficult or impossible to obtain such certificates? Of course, the truly lower classes who need them most.¹

And what of the electorally powerful castes? Are they not manipulating the reservations system? By getting themselves anointed "Backwards" to begin with? But a progressive like Justice Chinnappa Reddy would never accept that manipulation as a reason for doing away with either reservations or for removing those dominant castes from the Backwards' list.

Is it not a telling circumstance that progressives do not cavil at income being used to classify that very rural population into "Below Poverty Line" and "Above Poverty Line" families for purposes of the Public Distribution System, but are certain that the same criterion will be manipulated by the powerful if it is used for assessing eligibility for reservations?

What a progression! To get over the Constitution's deliberate use of the word "class" instead of "caste", it came to be held that in any case a "caste" is also a "class" – a proposition that means no more than our saying, "The chairs in this room are a class" in that they too are a collection of entities. That "A caste is also a class" became "Caste has always been recognized as a class". And that has now been taken to mean "Rooting things in 'castes' in fact fulfills the requirement of the Constitution that we formulate schemes for 'classes'."

A test that is mandatory in one instance, and forbidden in another!

Justice Kuldeep Singh is emphatic: the creamy layer must be skimmed off by a means test, otherwise the benefits of reservations will be "chewed up" by it. Setting out the reasons, the Judge points out that even within a class that has been identified as Backward there will be individuals who "may have individually crossed the barriers of

¹ *Ibid*, at 769, para 79.

backwardness," and that "It is often seen that comparatively rich persons in the backward class – though they may not have acquired any higher level of education – are able to move in the society without being discriminated socially." Therefore, they do not suffer from the infirmity which is the rationale for reservations. Moreover, these well-off persons within the backward class are no different in their behaviour towards and treatment of the poorer sections of that class: "The members of the backward class are differentiated into superior and inferior," the Judge writes. "The discrimination which was practised on them by the superior class is in turn practised by the affluent members of the backward class on the poorer members of the said class." As for measures such as the ones we are considering, "The benefits of special privileges like job reservations are mostly chewed up by the richer or more affluent sections of the backward classes and the poorer and the really backward sections among them keep on getting poorer and more backward. It is only at the lowest level of the backward class where the standards of deprivation and the extent of backwardness may be uniform." That has an immediate implication for policies of the State: "The jobs are so very few in comparison to the population of the backward classes that it is difficult to give them adequate representation in the State services. It is, therefore, necessary that the benefit of the reservation must reach the poorer and the weakest section of the backward class. Economic ceiling to cut off the backward class for the purpose of job reservations is necessary to benefit the needy sections of the class..."¹

Justice Sawant too is emphatic as far as the test itself is concerned – identifying and hiving out the creamy layer is mandatory, he declares. But an economic means test must not be the sole criterion for identifying who falls within this layer, the Judge maintains. The reason he gives is a curious one: if a means test is used as the sole criterion, all seats that have been reserved will be hogged by the socially and educationally advanced among the poor.² Does the reason not work the other way too? That is, as Justice Kuldeep Singh points out, if the well-to-do are not hived away, they will hog the reservations for the socially and educationally backward class?

¹*Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, at 492, para 385.

²*Ibid*, at 539, para 484.

Apart from maintaining that the creamy layer must not be identified solely by an economic criterion, Justice Sawant adds a condition that would in fact prevent any one from being excluded for an indefinite time in the future. He says that the test for identifying a person or section as falling within the creamy layer of a backward class must be that he has acquired the "social capacities" that are necessary for him to compete with the forwards. "The correct criterion for judging the forwardness of the forwards among the backward classes," he writes, "is to measure their capacity not in terms of the capacity of others in their class, but in terms of the members of the forward classes...." And in assessing whether he has acquired the "social capacities" to compete with the forwards, we must weigh whether he is now able to compete with them not for Class IV and Class V jobs in a service but for higher posts. "If the adequacy of representation in the services... is to be evaluated in terms of qualitative and not mere quantitative representation," the Judge says, "which means representation in the higher rungs of administration as well, the competitive capacity should be determined on the basis of the capacity to compete for the higher level posts also. Such capacity will be acquired only when the backward sections reach those levels or at least, near those levels. Till that time, they cannot be called forwards among the backward classes, and taken out of the backward classes."¹

Justice Ratnavel Pandian goes the whole hog! He will have nothing of the means test at all. He says it is "totally unworkable", that the moment one analyses it one realizes that "it is not a decisive test but on the other hand will serve as a protective umbrella for many to get into this segregated section by adopting all kinds of illegal and unethical methods" – the Judge must mean that the test would be circumvented to get *out of* the segregated creamy layer. The reasons he gives are quaint indeed, and give us a glimpse of the sorts of imaginings by which a judge rejects or accepts propositions when he wants to.

Assume, an annual salary of Rs. X has been taken as the ceiling so that, if a person is getting above X, he and his family members will be excluded from reservations. A government servant could escape under the ceiling, the Judge says, by voluntarily going on leave; a

¹*Ibid.*, at 553-54, paras 520 and 522.

person owning land could dodge the ceiling by leaving his land fallow in a particular year, or, better still, by selling a part of his land so as to reduce his income in a given year below Rs. X!

And, of course, "fluctuating fortunes or misfortunes" will influence who gets pushed into the creamy layer in any year.

And then there are the two brothers we have met in *Janki Prasad Parimoo*: they belong to the same backward class family; one is employed in Government, the other in a private company, or is a professional. If the annual income of the Government employee slightly exceeds the ceiling limit, the Judge fears, his children will not fall within the category of "poorer sections" while "the other brother can deceitfully show his income within the ceiling limit so that his children can enjoy that benefit." But didn't the Judge himself just tell us that the government servant would have no greater difficulty in escaping the ceiling by taking leave and lowering his income for that year "slightly"?!

The same sort of difficulties will arise among pensioners, the Judge fears – in the sense presumably that the pensioner will have a more difficult time escaping the ceiling than his brother who is in a profession in which it is easier to camouflage one's income.

And then there is the case of a person from a backward class who is "on the verge of retirement." His income may exceed X this year, and he may therefore be counted among the "creamy layer". But next year, when he has nothing but his pension, he may have to be excluded from it. Assume that to be the case. His income having gone down drastically, how is it unjust to exclude him? And how does excluding him impose some unbearable burden on those administering the reservations scheme?

And then a person may be among the backward today, but may "suddenly go out of its purview by any intervening fortuitous circumstances such as getting a marital alliance in a rich family or by obtaining any wind-fall wealth" – why he should not be excluded in such circumstances, the Judge of course does not explain!

"The above are only by way of illustrations," the Judge says, "though this type can be multiplied, for the purpose of showing that a person can voluntarily reduce his income and thereby circumvent the declared law of this Court. In all the above illustrations... the chance of 'getting into or getting out of' the definition of 'poorer

sections' will be *like a see-saw* depending upon the fluctuating fortunes or misfortunes."

Moreover, the means test "may severally suffer from the vice of corruption and also encourage patronage and nepotism."

And the means test "is highly impressionistic test, the result of which is likely to be influenced by many uncertain and imponderable facts... It may theoretically sound well but in practice attempts may be made in an underhanded way to get round the problem."¹

Would each and every one of these "reasons" not entail that all taxation should be abolished? What about the identification of families as being "below the poverty line" and above it for purposes of the Public Distribution System? Do those fluctuations in fortunes affect that cut-off point any the less? Is that identification any less "impressionistic"? Is it less amenable to deceit, to corruption, to nepotism?

Any argument will do! As will any quotation!

In *Indra Sawhney*, Justice Jeevan Reddy, accepting an argument advanced from the Bar, recalled that while the Supreme Court had struck down caste-based lists in *Champakam*, in *B. Venkataramana*, a case decided by the same Bench on the same day, the Court did not object to a list that was as much based on caste as the one in *Champakam*. The Judge went further, and advanced a caricature of an argument. He held that, as every Hindu has a caste, it would always be possible for a Hindu who had been excluded – presumably on any criterion other than caste – to argue that he had been excluded because of his caste. In support, he quoted a passage from the speech Dr. Ambedkar had made in Parliament during the debate on the 1st Amendment to the Constitution. It is instructive to read what Ambedkar had actually said, and the use to which Justice Jeevan Reddy puts the passage – for it gives us yet another glimpse of the mode of argumentation of progressives bent upon advancing a cause.

Ambedkar had said:

Then with regard to Article 16, clause (4), my submission is this that it is really impossible to make any reservation which would not result in

¹*Ibid*, at 418, para 207.

excluding somebody who has a caste. I think it has to be borne in mind and it is one of the fundamental principles which I believe is stated in *Mulla's* edition on the very first page that there is no Hindu who has not a caste. Every Hindu has a caste – he is either a Brahmin or a Mahratta or a Kundby or a Kumbhar or a carpenter. There is no Hindu – that is the fundamental proposition – who has not a caste. Consequently, if you make a reservation in favour of what are called backward classes which are nothing else but a collection of certain castes, those who are excluded are persons who belong to certain castes. Therefore, in the circumstances of this country, it is impossible to avoid reservation without excluding some people who have got a caste.¹

The inference that the Judge draws – namely, that, as every Hindu has a caste, if he is excluded he would have been excluded because of his caste – does not follow at all. Assume, there is a means test – for reservations or for subsidized foodgrain. A person with an income above the prescribed limit is excluded. He may have a caste, as he may have a religion, as he may be residing in a particular state, as he may be of Mongoloid or Scythian stock. But he would not have been excluded because of his caste any more than he would have been excluded because of his religion or residence or race. That is obvious. and yet the Judge presses the passage and his inference from it!

But at least that is a speech Ambedkar delivered in 1952! To support the proposition that class is caste in India, in *Indra Sawhney*, the judges cite a speech that Ambedkar is said to have made at Columbia University.² It turns out that that particular speech was made by him in 1916 – when he was 25! If a speech made by Ambedkar when he was 25 is so conclusive, why not what Pandit Nehru wrote to the Chief Ministers at the height of his Prime Ministership?

“One has to begin the process of identifying the backward somewhere,” the judges say in *Indra Sawhney*. “Might as well begin with castes.”³ But why not begin somewhere else? Why not adopt the alternate route which will eschew castes? In the same judgment, Justice R.M. Sahai, for instance, urges that the identification begin with occupation; that it next move to social acceptability; from

¹*Ibid*, at 665, para 699.

²*Ibid*, at 708, para 770.

³*Ibid*, at 716, para 782.

there to a means test; and finally to an assessment of whether the group that has been identified is adequately represented in the services of the State.¹ Would a route of this sort not conform better to the provisions of the Constitution?

Ever so often, progressive judges advance their line by just the order they impose on causation! Article 16(4) speaks of "any backward class of citizens." That could be an economically backward class. It could be an educationally backward class. Justices Jeevan Reddy and Pandian insist that the expression "primarily means *socially* backward class."² And that in practice, swiftly translates into Other Backward Castes!

Justice Sawant relies on another argument in addition. He says, "How does one identify the discriminated class is a question of methodology. [And hence need not detain the Court!]. But once it is identified, the fact that it happens to be a caste, race, or occupational group, is irrelevant. *If the social group has hitherto been denied opportunity on the basis of caste, the basis of the remedial reservation has also to be the caste.* Any other basis of reservation may perpetuate the *status quo* and may be inappropriate and unjustified for remedying the discrimination. When, in such circumstances, provision is made for reservations, for example, on the basis of caste, it is not a reservation in favour of the caste as a 'caste' but in favour of a class or social group which has been discriminated against, which discrimination cannot be eliminated, otherwise."³

Would it then be right to say that the way to do away with corruption is more corruption? To do away with terrorism is more terrorism? To do away with murder is to make murder commonplace? That to do away with slavery, we should enslave ever larger numbers? That fraud is eliminated by all-encompassing fraud? Indeed, we scarcely need recourse to such indirect questioning. The way reservations have stoked casteism itself shows that, even if discrimination in the past was based on caste, the way to remove it is to *not* base it on caste. The way is to adopt such criteria as would dissolve caste, such criteria as would make people transcend caste

¹ *Ibid*, at 612-15, paras 605 to 609.

² For instance, *Ibid*, at 393, para 117.

³ *Ibid*, at 511, para 418.

and strive to qualify on *those* criteria. The way is to stoke those technological changes, those processes of modernization as will erase caste.

Perspicacious judgments, and their warning

In his perspicacious judgment, Justice Kuldeep Singh is the one who spoke up for the core values of our religions as well as of our Constitution. He established beyond doubt that the approach of fellow judges, and, of course, what the politicians have been doing are, on the one hand, a gross assault on secularism; and, on the other, that they violate the basic tenets of our religions. He warned that what was being done was reviving casteism and that this in turn would divide our country. Reservations of jobs can be no remedy for backwardness in a country in which 74 per cent of the people are backward. Poverty is the root cause of social and educational backwardness. It is poverty, therefore, that must be removed, and this is where "successive governments, whether in the states or at the Centre, have been remiss in the discharge of their obligations, under the Constitution, towards the poor and backward people of the country." "Job reservation, as a dole, has been the vote-catching platter," the Judge wrote. In any event, Articles 16(2) and 16(4) together forbid any classification that is based on caste, and the enumerations that have been adopted by state governments as much as the enumeration that has been set out by the Mandal Commission, the Judge held, are based on little except caste.

The judgment addresses such vital concerns of our country, it is so clear on basics, it is so prophetic in the warnings it contains that I do hope that the day will come when it is taught in our classrooms. Here we can note just a few points from it.

Justice Kuldeep Singh notes the elemental point: the Constitution consciously uses the expression "classes" and not "castes" in Articles 15(4) and 16(4). It isn't that the word "castes" was unknown to them – they used it in the context of "Scheduled *Castes*", but in every other context they eschewed it and used the secular expression "classes".

Recalling declarations of the Supreme Court in *Chitralekha* and other cases, Justice Kuldeep Singh warned that by equating "classes" and "castes", the progressives are striking at a basic feature of the Constitution, namely, secularism. "Secular feature of the Constitution

is its basic structure," the Judge noted. "Hinduism, from which the caste system flows, is not the only religion in India. Caste is an anathema to Muslims, Christians, Sikhs, Buddhists and Jains. Even Arya Samajis, Brahmo Samajis, Lingayats and various other denominations in this country do not believe in caste system. If all these religions have to co-exist in India – can 'class' under Article 16(4) mean 'caste'? Can a caste be given a gloss of a 'class'? Can even the process of identifying a 'class' begin and end with 'caste'? One may interpret the Constitution from any angle the answer to these questions has to be in the negative."

Turning to the assertion that has been used so often, and was being used by his fellow judges on the Bench, Justice Kuldip Singh stressed, "To say that in practice caste system is being followed by Muslims, Christians, Sikhs and Buddhists in this country, is to be oblivious to the basic tenets of these religions. The prophets of these religions fought against casteism and founded these religions. Imputing caste system in any form to these religions is impious and sacrilegious."¹

Justice R.M. Sahai developed the matter further. The Articles in question apply to *all citizens* of the country, he pointed out. Hence, the criteria that must be chosen for identifying backward classes must be such as can apply to *all* citizens. "Caste" is not. Second, "When two words one wider in import and broader in application and other narrower were available and the Constitution-makers opted for one, the other, on elementary principle of construction, should be deemed to have been rejected." Justice Sahai added for good measure, "What was avoided by the Framers of the Constitution, for good reasons, and to achieve the objective they had set up for the governance of the country, cannot be brought back either by government or courts by interpretation or construction unless the consequences of accepting the literal or the normal meaning appear to be so unreasonable that the Constitution-makers would have never intended them." Nor can appeals to "the spirit of the Constitution," carry one in that direction, he said, citing the judicial truth, "Although the spirit of an instrument especially of a Constitution is to be respected not less than its letter yet the spirit is to be collected chiefly from its words."²

¹ *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, at 475, para 350.

² *Ibid*, at 589, para 574.

An alibi exploded

"But caste is a reality," progressive politicians, academics, judges had been intoning. So is religion. So is race. So is language. So is discrimination based on sex. Are provisions of the Constitution to be perverted by reading any of these into "classes"? Justice Sahai inquired. His words contain a decisive refutation of this oft-used alibi. The Judge said, "'Caste is a reality'. Undoubtedly so are religion and race. Can they furnish basis for reservation of posts in services? Is the State entitled to practice it in any form for any purpose? Not under a Constitution wedded to secularism." On the contrary, "State responsibility is to protect religion of different communities and not to practise it. Uplifting the backward class of citizens, promoting them socially and educationally, taking care of weaker sections of society by special programmes and policies is the primary concern of the State. It was visualized so by Framers of the Constitution. But any claim of achieving these objectives through race-conscious measures or religiously packed programmes would be uncharitable to the noble and pious spirit of the Founding Fathers, legally impermissible and constitutionally *ultra vires*."

Justice Sahai nailed the rationalization that had been adopted by progressive judges of the Supreme Court itself, and the cases on which they had been relying. He wrote, "Deriving inspiration from the American philosophy that, 'just as the race of students must be considered in determining whether a constitutional violation has occurred so also must race be considered in formulating the remedy' without any regard to the Preamble of our Constitution and provisions like Articles 15(1), 16(2) and 29(2) would be plunging our nation into disaster not by what was adopted and promised as the principle for governance for our people on our soil but from what has been laid down in a country which is yet far away from 'equality of result' or 'substantive equality' so far as *Black* or *Brown* are concerned."¹

¹*Ibid*, at 591, para 576. The "Black" and "Brown" refer to cases of foreign courts which many progressive judges had been invoking in season and out.

Two fundamental questions

Judgments have adduced several reasons to emphasize that OBCs as a class are envisaged to be different from Scheduled Castes and Tribes: the OBCs are socially and educationally disadvantaged but they do not suffer from the sort and extent of social privations as the SCs and STs. For one thing, they are mentioned separately in the Constitution. Second, had the Constitution intended them to be given the same facilities and concessions, it would have provided reservations for them also in the Lok Sabha. Third, the wording of the relevant provisions itself shows that the object of the Constitution in regard to the two categories is different: the object in regard to the SCs and STs is to end the discrimination of centuries, and lift them into the mainstream; the object in regard to the OBCs is to remove their social and educational handicaps and secure for them adequate representation in government services.¹

But from this fact – that the Constitution envisages them to be two different classes – opposite conclusions have been deduced. On the one hand, it has been inferred, for instance in *Chattar Singh*, that, as the two are distinct categories, OBCs are not entitled to receive the same sort of concessions and relaxations that are provided for SCs and STs. On the other hand, some judges have rested on the same proposition their view that, as the Constitution, realizing full well that the two are distinct classes, has provided for special measures to be taken for OBCs also, the condition of the latter need *not* be akin to that of SCs and STs for them to qualify for those measures, including reservations.

It is indeed symptomatic that, through the sorts of measures they approve for OBCs, the very progressives who denounce Hinduism

¹See, for instance, *Chattar Singh v. State of Rajasthan*, (1996) 11 SCC 742, at 749-51, paras 17 to 19.

for fomenting the caste system rationalize a scheme that perpetuates and exacerbates that very caste system.

From the warnings they had sounded, judges as diverse in their perspectives as Justices V.R. Krishna Iyer, H.R. Khanna, A.P. Sen, D.A. Desai urged two further prescriptions – the “weaker sections” and “Backward Classes” to which reservations are extended must be, to use the words of Justice Krishna Iyer, not any “backward class” but “those dismally depressed categories comparable economically and educationally to Scheduled Castes and Tribes.”

In a series of judgments – *Balaji*, *Janki Prasad Parimoo*, etc., the Supreme Court had held that only those groups should be subsumed in “Backward Classes” whose condition is comparable to that of Scheduled Castes and Tribes. Once this norm is adopted, the Court emphasized, difficulties in the way of specifying which groups should be included in this category would be eased.¹

Returning to this requirement later in *N.M. Thomas*, Justice Krishna Iyer put the point in even stronger terms. He wrote,

I must repeat the note of caution earlier struck. Not all caste backwardness is recognised in this formula. To do so is subversive of both Article 16(1) and (2). *The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. If we search for such a class, we cannot find any large segment other than the Scheduled Castes and Scheduled Tribes. Any other caste, securing exemption from Article 16(1) and (2), by exerting political pressure or other influence, will run the high risk of unconstitutional discrimination. If the real basis of classification is caste, masked as backward class, the Court must strike at such communal manipulation.* Secondly, the Constitution recognizes the *claims* of only *barijans* (Article 335) and not of every backward class. The profile of Article 46 is more or less the same. So, we may readily hold that casteism cannot come back by the back door and, except in exceptionally rare cases, no class other than *barijans* can jump the gauntlet of “equal opportunity” guarantee. Their only hope is in Article 16(4).²

¹For instance, *Janki Prasad Parimoo v. State of Jammu and Kashmir*, (1973) 1 SCC 420, at 434, para 25.

²*State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 370, para 143. Experience since then, of course, indicates that he was too sanguine in his expectation that, given this restriction, “we may readily hold that casteism cannot come back by the back door.”

For the several reasons that he had given and which we have glimpsed earlier, Justice D.A. Desai also emphasized that the group to which reservations are extended "must have the same indicia as Scheduled Castes and Scheduled Tribes."¹

A second prescription also flowed from the facts that successive judgments had noted – in particular, that there was much heterogeneity within each caste, and that the better off within the caste were cornering the benefits that accrued from reservations. Justice Krishna Iyer, as has been his wont, had the most to say on the twin facts and their consequences. In *N.M. Thomas*, he wrote,

In the light of experience, here and elsewhere, the danger of "reservation", it seems to me, is threefold. *Its benefits, by and large, are snatched away by the top creamy layer of the "backward" caste or class*, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, *this claim is overplayed extravagantly in democracy by large and vocal groups* whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the "weaker section" label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher "backward" groups with a vested interest in the plums of backwardism... In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among *harijans*, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a "noble romance", the bonanza going to the "higher" *harijans*.

He, therefore, stressed the need for innovative administrative measures that would ensure that the benefits actually reached the intended target groups, the "weakest of the weak"; detailed social science research to monitor who was receiving the actual benefits; and "a constant process of objective re-evaluation of progress" "lest a once deserving 'reservation' should not be degraded into 'reverse discrimination'".²

¹*K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 730, para 21.

²*State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 363, para 124.

Concluding his judgment, Justice Krishna Iyer said that "The heady upper berth occupants from 'backward' classes do double injury. They beguile the broad community into believing that backwardness is being banished. They rob the need-based bulk of the backward of the 'office' advantages the nation, by classification, reserves or proffers." As such, "The constitutional *dharmā*... is not an unending deification of 'backwardness' and showering 'classified' homage, regardless of advancement registered, but progressive exorcising of the social evil and gradual withdrawal of artificial crutches." While noting that the condition of the *harijans* was such that benefits to them would have to be continued for quite some time, he admonished all concerned for not doing their duty in this regard: "The Court has to be objective, resisting mawkish politics."¹

And in *Soshit Karamchari Sangh*, as we shall see in detail later, the same Judge falls for exactly that – "mawkish politics." When the point is advanced that the better off among *harijans* and the OBCs are hogging the benefits, he is dismissive. "Nor does the specious plea that because a few *harijans* are better off, therefore, the bulk at the bottom deserves no jack-up provisions merit scrutiny," he pronounces. "*A swallow does not make a summer*. Maybe, the State may, when social conditions warrant, justifiably restrict *harijan* benefits to the *harijans* among the *harijans* and forbid the higher *harijans* from robbing the lowlier brethren." He returns to the prospect of benefits being gobbled up in general, and is equally dismissive: "Maybe, some of the forward lines of the backward classes have the best of both the worlds and their electoral muscle *qua* caste scares away even radical parties from talking secularism to them. *We are not concerned with that dubious brand*. In the long run, the recipe for backwardness is not creating a vested interest in backward castes but liquidation of handicaps, social and economic, by constructive projects. *All this is in another street and we need not walk that way now*."²

Tied in knots

We will have occasion to consider Justice Krishna Iyer's switch,

¹*Ibid*, at 373, para 149.

²*Akshil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 297-98, paras 92, 94.

his selective activism later. For the moment we may only note the problem that together the two propositions soon created. On the one side is the patent fact: while Articles 15(4) and 340 use the expression, "socially and educationally backward class of citizens," Article 16(4) does not – it speaks of any "backward class of citizens." On the other hand, has been the anxiety of progressives to extend reservations to Other Backward Castes.

Initially, as we have seen, progressive judges, anxious about their commitment to "*barijans* and *girijans*" advanced three propositions. First, the expressions, "socially and educationally backward class of citizens" and "backward class of citizens" mean more or less the same thing. Second, to be entitled to reservations, the groups must be *both* socially *and* educationally backward. Third, the "Other Backward Classes" that are identified must have been subjected to the same sort of extreme discrimination as, and their present destitution must be comparable to, Scheduled Castes and Tribes.

These propositions tied the progressives in knots. For one thing, they ruled out of court many a caste that was demanding reservations, and which was vociferous enough so that anyone denying reservations to it would be certain to be denounced for being a high-caste protector of the *status quo*! Second, it did seem a bit odd that government jobs should be set aside for those who are by definition "*educationally backward*".

Progressive judges have, therefore, modified their decisions in two ways. First, they have maintained that, while the Constitution uses the expression "socially and educationally backward class of citizens," what it means is that they should be "*mainly* socially backward" – this is the gravamen of the judgment of Justice Jeevan Reddy and others in *Indra Sawhney*.¹

Second, they have worked to sever the link between Scheduled Castes/Tribes and the Other Backward Castes, so called. Justice Chinnappa Reddy had already seen the restrictive implications of the condition that had been prescribed in judgments from *Balaji* onwards, including Justice Krishna Iyer's observations in this regard, and had, accordingly, expressed himself strongly against them in *Vasanth Kumar*. Those observations "were not intended to lay down any proposition that the socially backward classes were those class of

¹*Indra Sawhney*, *op. cit.*, for instance, at 523, 720, paras 447, 788.

people whose conditions of life were very nearly the same as those of the Scheduled Castes and Tribes," he declared. What else did the observations intend to do? A test of that kind, Justice Chinnappa Reddy argued, if accepted, "would practically nullify the provision for reservation for socially and educationally Backward Classes other than Scheduled Castes and Tribes."¹

In *Indra Sawbhney*, Justice Jeevan Reddy invokes this rejection, and builds on it. There is no reason to restrict or qualify the expression "backward class of citizens," he maintains. Article 16(4) does *not* use the expression "Scheduled Castes and Scheduled Tribes." Therefore, "there is no reason why we should treat their backwardness as the standard backwardness for all those claiming its protection." In fact, even within the general category, "Scheduled Castes and Scheduled Tribes," the groups are dissimilarly situated. If some other group suffers from as much privation and has been the subject of comparable injustice, it may have a case for being included in the SC/ST list. There is no reason to insist that the condition of others should be comparable in privation and discrimination to that of the SCs/STs.²

The "pragmatic" consideration, so to say, apart, namely that, if the test is adopted, too many of the OBCs will get shut out from reservations, Justice Jeevan Reddy's thesis rests on the point that two different sets of expressions are used in Articles 15(4) and 16(4) – in particular, on the fact that the latter does *not* use the expression "Scheduled Castes And Scheduled Tribes": how can the "backward classes" it contemplates then be equated with Scheduled Castes and Tribes?, he and other judges demand.³

Is it not a surprise then that the central fact that runs through all these Articles – that the Constitution uses the word *classes* and not *castes* – is so consistently disregarded by these very judges?!

Justice R.M Sahai points to another vital word. Do not lose sight of the simple "is" in Article 16(4), he says. The objective of the Article is not to make reparations for historical injustices and discrimination. It is to enable the State to induct in its services those whose representation at present *is* inadequate.⁴

¹(1985) Supp. SCC, 714, at 747-48, para 51.

²*Indra Sawbhney*, *op. cit.*, at 725, 766, paras 794, 859.

³For Justice Sawant on this, *Indra Sawbhney*, *op. cit.*, at 523, para 447.

⁴*Indra Sawbhney*, *op. cit.*, at 606, para 595.

Why is there all this concern for a few reserved jobs being cornered by the creamy layer?, Justice Chinnappa Reddy demands in *Vasanth Kumar*. Are non-reserved jobs not cornered by the creamy layer? How does the snatching away establish that there should be no reservations? Strange as this may seem, it is exactly what the Judge argues. The passage reads: "That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. *Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layer of society itself?* Seats reserved for the backward classes are taken away by the top layers amongst them on the same principle of merit on which the unreserved seats are taken away by the top layers of society. How can it be bad if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad? This is a necessary concomitant of the very economic and social system under which we are functioning. The privileged in the whole of society snatch away the unreserved prizes and the privileged among the backward classes snatch away the reserved prizes. This does not render reservation itself bad. But it does emphasise that mere reservation of a percentage of seats in colleges and a percentage of posts in the services is not enough to solve the problem of backwardness..."¹

Justice Jeevan Reddy quotes this argument approvingly. He does allow, however, that the creamy layer should be hived off so that it does not hog the benefits of reservations. But he adds a caveat: the cut-off bar he permits is to be placed so high that hardly any one would be inconvenienced by it! A member of the Backward Class, say a carpenter, goes to the Middle East. He will earn quite a high income. But is he for that reason to be excluded from the Backward Class?, the Judge asks. Are his children to be deprived of reservations? The only circumstance in which this may be done is "*if he rises so high economically as to become say a factory owner himself.*" Only in such a circumstance would his social status have risen to justify his being assumed to have moved out of the Backward Class.²

¹*K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714, at 763, para 72.

²*Indra Sawhney*, *op. cit.*, at 724, para 792.

In *Indra Sawbney*, the Court returned to this issue, and prescribed in the clearest possible terms that the “creamy layer” must be skimmed off from the “Backward Classes” and excluded from the reservations that the State may decree.

The decisive formulation

In *Indra Sawbney*, eight of the nine judges held that the top “creamy layer” must be excluded from the classes for which reservations are made. They gave a series of reasons for this conclusion.¹

¹There are manifest problems with the formulation that the Court adopted even in *Indra Sawbney*. They will take us far from our current concern. Hence, I note them here just in passing. For one thing, there are substantial differences over what criteria should be used to identify the “creamy layer”. Four of the judges in the case held that the layer should be identified by economic measures, adding, however, that individuals and groups exceeding the prescribed limit should not be excluded unless they are economically so much better off that the level of their advance has resulted in their social advancement. One judge, Justice Sawant, as we have seen, made the test even more stringent: he maintained that no group should be excluded until it has acquired the social capacities to compete with the classes that are forward. Even such differences can come in handy for those who would want to push *Indra Sawbney* in a still more populist direction.

But there are in addition formulations that can give rise to more basic problems. Consider two representative passages on the question at hand. The Court declares:

A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Identification of the backward classes can certainly be done with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does – what emerges is a ‘backward class of citizens’ within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group or class encompassing an overwhelming majority of the country’s population, one can well begin with it and then go to other groups, sections and classes.

The Court elaborated this as follows:

.....while answering Question 3(b), we said that identification of backward classes can be done with reference to castes along with other occupational groups, communities and classes. We did not say that that is the only permissible method. Indeed, there may be some groups or classes in whose case caste may not be relevant to all. For example, agricultural labourers, rickshaw-pullers/drivers, ...

The Court gave a series of reasons why the "creamy layer" must be excluded. First, it said, reservations are to be for a *class*. To be a *class*, the group must be homogeneous. When some in it are so clearly different from the others, it loses its character as a *class*. Correspondingly, the ones who have reached an "advanced social level or status" would no longer belong to that "Backward Class". They are "as forward" as a member of a forward class. "If some of the members are far too advanced socially (which in the context necessarily means economically and may also mean educationally), the connecting thread between them and the remaining class snaps." Hence, "After excluding them alone, would the class be a compact class." We must bear in mind that under the Constitution, reservations are being made for a *class* not for a caste, the Court said.¹

Second, the Court emphasized repeatedly, that unless these advanced persons are excluded, they will hog all the benefits that legislation may seek to provide to the Backward Class, and the very purpose of reservations will be defeated.

In circumstances which will become apparent in a moment, the Court was constrained to return to this matter seven years later. It reiterated what it had held in *Indra Sawhney*, but in even stronger terms. "If the forward classes are mechanically included in the list of backward classes or if the creamy layer among backward classes is not excluded," the Supreme Court stated in *Indra Sawhney-II*, "then the benefits of reservation will not reach the really backward among the backward classes. Most of the benefits will then be knocked away by the forward castes and the creamy layer..."² And again, in even stronger terms, "When governments unreasonably refuse to eliminate creamy layers from the backward classes or when governments tend to include more and more castes in the list of Backward Classes without adequate data and inquiry, a stage will be reached soon when the whole system of reservation will become farcical and a negation of the constitutional provisions relating to reservations. The resistance

... street-hawkers etc. may well qualify for being designated as Backward Classes. [*Ibid.*, at 185, paras 11-12.]

Transpose the words to the case of a religious group, say, Muslims. How then are they less qualified to be a backward class deserving reservations *as Muslims*?

¹ *Ibid.*, paras 784, 790-93, and paras 843-44.

² *Indra Sawhney v. Union of India*, (2000) 1 SCC 168, at 185, para 10.

of the creamy layer to get out of the lists is as bad as the clamour for entry into the quota system of various castes whose social status does not conform to the law decided by this Court..."¹

Third, the Court pointed out that retaining within a "Backward Class" persons or groups who had actually transcended backwardness would amount to treating unequals equally, and thereby be a violation of the fundamental principle of equality. Conversely, when these advanced individuals and groups are accorded reservations and similarly placed individuals or groups who happen not to be from these designated castes are not accorded reservations, equals would be treated unequally, and that too would be a violation of the fundamental principle of equality. "As the 'creamy layer' in the backward class is to be treated 'on par' with the forward classes and is not entitled to benefits of reservation, it is obvious that if the 'creamy layer' is not excluded, there will be discrimination and violation of Articles 14 and 16(1) inasmuch as equals (forwards and creamy layer of backward classes) cannot be treated unequally," the Court said. "Again, non-exclusion of creamy layer will also be violative of Articles 14, 16(1) and 16(4) of the Constitution of India since unequals (the creamy layer) cannot be treated as equals, that is to say equal to the rest of the backward class. These twin aspects of discrimination are specifically elucidated in the judgment of Sawant J,... The constitutional principle that equals cannot be treated unequally and unequals cannot be treated equally based on Articles 14 and 16(1) overrides other considerations... What we mean to say is that Parliament and the legislatures in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet."

What the Court was compelled to state in conclusion goes farther than reservations and raises a fundamental point. The Court declared, "Whether creamy layer is excluded or whether forward castes get included in the list of backward classes, the position is the same, namely, that *there will be a breach not only of Article 14 but also of the basic structure of the Constitution*. The non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes

¹*Ibid*, at 209, para 90.

will, therefore, be totally illegal. *Such an illegality offending the root of the Constitution cannot be allowed to be perpetuated even by Constitutional amendment...*¹

That is the fundamental point that we must ponder. For the moment note that the Supreme Court has absolutely unambiguously and repeatedly directed that

- ❑ The creamy layer must be identified.
- ❑ The identification – and the consequent exclusion – of this lot must be real: in *Ashok Kumar Thakur v. State of Bihar*,² the Supreme Court came down heavily on the states of Bihar and U.P. for trying to get around this requirement by positing such “unrealistically high levels of income or other conditions” as to reduce it to a nullity, and declared that they “had acted in a wholly arbitrary fashion and in utter violation of the law laid down in the Mandal case.”³
- ❑ The exercise of identifying the layer must be deliberate, and not just a mechanical one of going through the motions.
- ❑ It must seek to identify the advanced sections on relevant material.
- ❑ And the list must be reviewed periodically. “Once backward, always backward is not acceptable.”⁴

“Flouting with impunity”

In a word, the law and the requirements that flow from it have been laid down in the strongest terms and as unambiguously as possible. To gauge how the political class, in particular legislatures and governments, responded, consider what happened in a “progressive” state like Kerala. The very case we are perusing, *Indra Sawhney-II*, provides a telling illustration.

Indra Sawhney-I had directed that both at the Central level and in the states, commissions be set up within four months to identify the creamy layer among backward castes. That case had been decided on 16 November 1992.

¹*Indra Sawhney-II*, paras 29, 55, 69.

²(1995) 5 SCC 403.

³*Indra Sawhney-II*, at 192, para 31.

⁴*Indra Sawhney-II*, at 184, para 9.

For three years the Kerala Government did nothing to implement this direction.

The dereliction was taken to the Supreme Court. On 20 March 1995, the Court issued a notice to the state to show cause why it should not be held guilty of having committed contempt.

The Kerala Government filed an affidavit stating that an Act had already been passed to set up the required Commission, that it was just that the Commission, more than once, had held that it did not have the power to identify the creamy layer. "In our opinion," the Supreme Court said, "these events were set out in the above affidavit filed by the Chief Secretary only to ward off any penal action for contempt of this Court. The above explanation was naturally found to be wholly unsatisfactory..." The Court held that the state had acted in "willful disobedience" of its directions and had committed contempt. That was on 10 July 1995. The Court gave the Government two months to purge the contempt.

On 13 July 1995, three days after the judgment, the Kerala Cabinet decided that a Standing Committee be set up to identify the creamy layer.

But "suddenly", as the Supreme Court was to note later, on 27 July 1995, the Government decided to continue the existing system of reservations. With predictable alacrity, on 31 August 1995, an Act was passed which stated, *inter alia*, that "having regard to known facts in existence in the state," "there are no socially advanced sections in any Backward Classes who have acquired capacity to compete with forward classes," that the Backward Classes remain inadequately represented in the services, and therefore, "Notwithstanding anything contained in any law or in any judgment, decree or order of any court or other authority," the system of reservations shall continue as it was at the time, and that the rules to enforce it "shall, for all purposes, be deemed to be and to have always been validly made"! The Act was given retrospective effect from 2 October 1992 to boot.

Reviewing the Act, the Supreme Court held that "the known facts" on the basis of which the Act was said to have been passed "were indeed non-existent". It drew attention to the fact that the Cabinet itself had decided to set up a Commission to identify the creamy layer, and then within three weeks suddenly reversed itself. It drew attention to the fact that later, the Supreme Court had

been constrained to appoint a High Level Committee under Justice Joseph, and that this Committee had indeed identified such a layer without much difficulty. The Court was, accordingly, led to conclude,

It appears to us, therefore... that the Kerala Act had shut its eyes to realities and facts... [and that] the declaration [in the Act about 'known facts in existence', etc.] made by the legislature has no factual basis in spite of the use of the words 'known facts'. The facts and circumstances, on the other hand, indicate to the contrary. In our opinion, the declaration is a mere cloak and is unrelated to facts in existence...

The Supreme Court, therefore, set up a Committee directly, and that Committee submitted its report on 4 August 1997. As action even after that was tardy, the Supreme Court delivered a stinging judgment in *Indra Sawhney-II* in December 1999.

It recorded that "the Kerala Government has been already found to have deliberately violated the directions of this Court... and been held guilty of contempt of Court." The pattern that the actions of the Government and the legislature which the Court had documented pointed to even graver issues. The Court said that "the unreasonable delay on the part of the Kerala Government and the discriminatory law made by the Kerala Legislature have been in virtual defiance of the rule of law and also an indefensible breach of the equality principle which is a basic feature of the Constitution. They are also in open violation of the judgments of this Court which are binding under Article 141 and the fundamental concept of separation of powers which has also been held to be a basic feature of the Constitution..."

The hypocrisy and opportunism that underlay the actions compelled the Court to observe,

This attitude and action of the state of Kerala has unfortunately resulted in allowing the 'creamy layer' among the backward classes in the state of Kerala to continue to grab the posts in the services in government, public sector, etc., even after *Indra Sawhney*, and get away with the same. The result is that the really backward among the backward classes have been deliberately deprived by the state of their legitimate right to these posts which would have otherwise obviously gone to them. To us it appears rather anomalous that while the governments declare endlessly that they will see to it that benefits of reservations really reach the needy among the backwards, the very action of the governments both on the Executive side

and on the legislative side, deliberately refusing to exclude the creamy layer and in indiscriminately including more castes in the backward classes list are leading to a serious erosion of the reservation programme.

The attitude of the Kerala Government and legislature revealed much about their priorities. The Court observed:

...the state of Kerala did not care if its Chief Secretary was to go behind bars. It did not care if the real backwards were left in the lurch. It then took to legislation inasmuch as it would then be difficult for this Court to hold the legislature in contempt. It is difficult for us to think that the Kerala Government really believed in the validity of its legislation. It appears to us that it thought better to leave it to the courts to strike down the Act. Years would roll by and in the interregnum the creamy layer could continue to reap the benefits of reservation.

This was a problem that transcends the particular case, and even the particular government and legislature. The Court observed,

Unfortunately today, as a matter of political expediency, governments tend to knowingly violate the Rule of Law and the Constitution and pass on the buck to the courts to strike down the unconstitutional provisions. It would then become easy for the government to blame the courts for striking down the unconstitutional provisions. The case on hand is a typical illustration of such an attitude.¹

As stinging a rebuke, and as explicit a description of where opportunist, vote-bank politics has landed the country. But I am on the general pattern, and on the responsibility for it. A heap of examples can be given of the Executive disregarding orders of the Supreme Court, and no one being any the worse off for doing so. For seats in educational institutions, for posts in government service to be reserved for some group, the Supreme Court has held time and again, the group must not only be one that is in need of special measures because it is disadvantaged economically and socially, it must in the first instance be a homogeneous class. Thus, for instance, we may conclude that the "rural population" is socially and economically handicapped, but, as we have seen, the Court struck down the decision of U.P. to reserve seats for the population of "rural

¹On the preceding, *Indra Sawhney v. Union of India*, (2000) 1 SCC 168, paras 36, 37, 41-46, 85, 88-93.

areas" on the ground that 80 per cent of the population of the state cannot be a homogeneous class.¹ On this reasoning, the Supreme Court has repeatedly held, and unambiguously, that place of birth cannot be the basis for reservations, and it has passed detailed orders to this effect in several cases. And yet, in *Saurabh Chaudri*, it was constrained to note, "It is neither in doubt nor in dispute that before the scheme was evolved in *Dr. Pradeep Jain's* case, notices had been issued to all the States and all of them were fully heard. But despite the same, the orders passed by this Court in *Dr. Pradeep Jain's* case had been flouted with impunity, *inter alia*, by the states of Assam, Karnataka, Goa and Tamil Nadu. Now it transpires that even the state of Punjab has also not been following the said decision..."² And yet an incomplete statement. For in such instances, the Executive dragged its feet, the legislature passed a law of convenience. But, as we have seen, *in the end, the Court too did not set an example by actually punishing anyone*. And that is typical, especially in cases where changes have been clothed in the garb of "social justice" and the like. The judiciary as much as any other group has been nervous, defensive lest someone label it conservative.

Both features – that a distressingly large proportion of cases in this field has come before the Supreme Court because the governments have deliberately not adhered to the decisions of the Court, and that the overwhelming proportion of amendments of the Constitution in regard to reservations has been enacted to overturn the law as laid down by the Supreme Court – call for reflection:

- ❑ How is it that governments feel they can get away with flouting the Court's orders "with impunity"? In particular, does the Court encourage this kind of cavalier conduct by its lenience?
- ❑ When, as we noted earlier, the Supreme Court strikes down a measure on the ground that it violates the Basic Structure of the Constitution, does the measure cease to do so because Parliament has amended some Article? Who is to settle what is the Basic Structure? The Supreme Court or some evanescent majority in Parliament?

¹ *State of Uttar Pradesh v. Pradip Tandon*, (1975) 1 SCC 267.

² *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146, at 161, para 26.

The juggernaut

50%: origin of the figure, its fate, consequences of its fate...

What is conceded once to appease an aggressive group, to pander to a vote bank just cannot be taken back. It becomes the test of fidelity to the "cause" – anyone who even suggests that there is a better way to help the very persons in whose name the concessions have been made is pounced upon as "Anti-Dalit", "Anti-poor"... Society gets polarized, politics whirls, power gets congealed along those chasms. Far from being able to step back, what has been conceded in one round becomes the floor for the next.

The Constitution as it was adopted provided that seats would be reserved in legislatures for Scheduled Castes and Scheduled Tribes for ten years. That period expired in 1960. Forty-five years after that date passed, who dare today advocate that there be no reservations after some particular date howsoever distant in the future?

Each concession, once made, just goes on swelling. Once a dilution or compromise is agreed to, it paves the way for, indeed it becomes the justification for the next, greater dilution: "But there is nothing new in this," the argument runs, "the *principle* was agreed to years ago."

Article 15 (4) – "Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes" – and 16(4) – "Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State" – are, as their language plainly indicates, *enabling* provisions. In fact, they have become *mandatory* provisions.

The twin objectives of Articles 15 and 16 were to provide adequate protection to the disadvantaged on the one hand and, through special measures, raise their capabilities so that they would on their own compete with the rest. The duty to provide *adequate protection* became the duty to give *preferential treatment*.

The duty to give preferential treatment has become the duty to *meet over-riding claims* as a first charge. Article 335, Justice V.R. Krishna Iyer reminds us, speaks of "*claims* of Scheduled Castes and Scheduled Tribes to services and posts" and directs that "The *claims* of Scheduled Castes and Scheduled Tribes *shall* be taken into consideration, consistently with the maintenance of efficiency of administration...." "This provision," he declares, "directs pointedly to the *claims* of – not compassion towards *harijans* to be given special consideration in the making of appointments in the public services...."¹ Justice A.C. Gupta correctly points out in the same judgment that Article 335 does not enlarge the claim, that in fact the provision *qualifies* it! As he says,

This Article does not create any right in the members of the Scheduled Castes and the Scheduled Tribes which they might claim in the matter of appointments to services and posts; one has to look elsewhere, Article 16(4) for instance, to find out the claims conceded to them. Article 335 says that such claims shall be considered consistently with administrative efficiency; this is a provision which does not enlarge but qualify such claims as they may have as members of the Scheduled Castes and Scheduled Tribes...²

But how can words slow down the zealous?! Claim it is. And soon, claim not just at the appointments stage but also in promotions. And just a little later, claim not just of the Scheduled Castes and Tribes but also of those who are not mentioned in the Article – Other Backward Classes! The Scheduled Castes and Tribes, the OBCs "need aid," Justice O. Chinnappa Reddy declaims, "they need facility; they need launching; they need propulsion. Their *needs* are their *demands*. The demands are *matters of right* and not of philanthropy. They ask for parity, and not charity."³

¹ *State of Kerala v. N.M. Thomas*, 1976 2 SCC 310 at 365, para 128.

² *Ibid*, at 402, para 227.

³ *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 737, para 33.

Ambedkar's figure, and what has happened since then

Similarly, take the question of the proportion of seats that may be reserved. In his speech in the Constituent Assembly on the provision that then dealt with reservations, Article 10 of the Draft Constitution, Dr. B.R. Ambedkar himself cautioned against an exception to the fundamental rule of equality becoming so large as to "eat up the rule altogether." "Let me give an illustration," he said. "Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore, the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is only then that the first principle could find its place in the Constitution and [be] effective in operation...."¹ And yet, in the wake of *Indra Sawhney*, states that have reserved 69 per cent of seats – almost exactly the proportion mentioned by Ambedkar to emphasize how the rule of equality would be swallowed by the exception, recall his illustration, "Supposing, for instance, reservations were made... the total of which came to something like 70 per cent of the total posts under the State...." – have been specifically allowed to retain the 69 per cent reservations.

In *M.R. Balaji*, speaking, as it said, "generally and in a broad way", the Supreme Court said, "a special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case."²

From "less than" to "a minimum of"
to "of total positions in the service" to...

Notice, first of all, that in *M.R. Balaji*, the Supreme Court was dealing with what may be done in educational institutions, *not* with what is to

¹ *Constituent Assembly Debates*, 30 November 1946, p. 701.

² *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649, at 663, para 34.

be done while running a governmental service or structure. Yet that judgment became the mandate for "50 per cent in services of the State."

Furthermore, notice that even in regard to educational institutions, the Court said that "a special provision should be *less than 50 per cent*."

That "less than 50 per cent" has become, by steps that we shall encounter, not just "50 per cent," it has become a *mandatory* 50 per cent, 50 per cent in recruitment in a service, that is.

That mandatory 50 per cent in *recruitment* has become a mandatory 50 per cent *in the total positions in a service*. So that, when the per cent reserved in *recruitment* during a particular year has been less than 50 per cent of *the total strength of the service*, that excess has been upheld. Thus in *N.M. Thomas*, 34 of the total 51 promotions were reserved – that is, 68 per cent of the positions at the next level – were to be assigned by birth. And they were reserved by a device which has cast a long shadow as we shall soon see. As few were qualified to meet even the meager norm which had been set for these reserved posts, the standard was diluted in that the persons were allowed to acquire those minimal proficiencies in a longer time than had been originally prescribed. The Judge had no difficulty: "The promotions made in the service as a whole are nowhere near 50 per cent of *the total number of posts*..." Hence, he said, the order reserving this proportion of posts by relaxing the standards was not just fulfilling the (legally non-enforceable) Directive Principle of Article 46 – "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation" – but is in fact "meant to implement... the direction under Article 335" – the direction, namely, that the State shall take account of the claims of members of the Scheduled Castes and Tribes "consistently with the maintenance of efficiency of administration!"¹

The "mandatory 50 per cent in *the total positions* in a service" has become a mandatory 50 per cent at *all levels* in a service. Hence, reservations in promotions have become the order of the day.

¹*State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 at 337, para 42.

In *N.M. Thomas*, judges rationalized their approval for reservations in promotions by diluting the minimum qualifications that had been prescribed on the ground that actually the minimum standards were not being diluted, all that was happening was that members of a particular class – the Scheduled Castes and Tribes – were being given a little more time to come up to them: of course, they did not press the point that this extension was the latest in a series of extensions, the time limit having been extended again and again, earlier, in 1958, then in 1972, then in 1974! Since then, the case has become the scripture for relaxing not just the time within which prescribed qualifications must be acquired but for relaxing the qualifications themselves! The “*principle*” of relaxation has already been accepted by this Court, the succeeding batches of progressive judges have declared.

*From “candidates must come up to the standard”
to “the standard must come down to the candidates”*

In *N.M. Thomas* the judges gave another reason. They asserted that the qualifications that had been laid down were not really all that vital for fulfilling the mandate of Article 335 – namely, that of maintaining the efficiency of administration.¹ If that was so, why the standards had been prescribed at all, of course, was not something on which the judges would expend their time. The “*principle*” of relaxation having been accepted, relaxations of standards in regard to skills which were manifestly necessary for the tasks that had to be performed has become, as we shall soon see, the order of the day, and have been upheld by the courts.

Having just declared,

We must expect that Government will, while fixing the longer grace time for passing tests, have regard to administrative efficiency. You can't throw to the winds considerations of administrative capability and grind the wheels of Government to a halt in the name of '*barijan* welfare'. The administration runs for good government, not to give jobs to *barijans*...²

¹For instance, Justice V.R. Krishna Iyer in *State of Kerala v. N.M. Thomas*, (1976)

²SCC 310 at 357, para 110.

²*Ibid*, at 357, para 109.

Justice V.R. Krishna Iyer pointed out that these are just clerical posts, and scoffed:

We need not tarry to consider whether Article 16 applies to appointments on promotion. It does. Nor need we worry about administrative calamities if test qualifications are not acquired *for a time* [Italics in the original] by some hands. For one thing, these tests are not so telling on efficiency as explained by me earlier. And, after all, we are dealing with clerical posts in the Registration Department where alert quill-driving and a smattering of special knowledge will make for smoother turnout of duties. And the Government is only postponing, not foregoing, test qualification...¹

Justice K.K Mathew was, of course, even more revolutionary. As in his reading the object of that enabling provision, Article 16(4) of the Constitution, is the mandatory one to ensure that those who are inadequately represented get to be adequately represented, he could not be bothered by so trifling a thing as relaxation of standards. He declared, "The State can adopt *any measure* which would ensure the adequate representation in public service of the members of the Scheduled Castes and Scheduled Tribes and justify it as a compensatory measure to ensure equality of opportunity provided it does not dispense with the acquisition of the basic minimum qualification necessary for efficiency of administration..." And Government can extend that "any measure" to Scheduled Castes and Tribes and confine it to them, or it can extend it to OBCs or to all of the three, he said. "The law-maker should have the liberty to strike the evil where it is felt most."

He went further and called into question the notion of standards itself. He said that the standards must be so devised that they do not lead to "exclusion on grounds other than those appropriate or rational for the good (posts) in question," and in the very next sentence declared that even this is not enough. To recall his words, "The notion requires not merely that there should be no exclusion from access on grounds other than those appropriate or rational for the good in question, *but the grounds considered appropriate for the good should be such that people from all sections of society have an equal chance of satisfying them.*"² In a word, now, if he is from a caste that is not

¹*Ibid*, at 369, para 140.

²*Ibid*, at 341, 342, 347, paras 58, 59, 79, 80. Italics in the original.

adequately represented in the services of the State, it is not the candidate who is to be judged by the standard that has been prescribed. *That standard* has to be judged by whether it enables or prevents members of that caste from making it into the services! And not just by whether it enables persons from that caste to make it to the services but by whether it enables them to get promoted in them from one level to the next.

Notice that in all this Justice Mathew equates “the good” in question with not an efficient system of governance but with the *posts* that are available. Actions of the entire State must be informed and illuminated by this approach, he says, and as, under Article 12, the judiciary is a part of “the State”, it also must be guided by this approach.¹

What has been taken forward in each round is the “principle” which has been upheld by the Supreme Court in the preceding round. The Court has upheld the “*principle*” of relaxing standards, so standards can be relaxed to any extent – even to the extent, as we shall soon see, of being waived altogether. The Court has upheld the “*principle*” of reservations in promotions in the clerical service, so reservations in promotions in all services are valid. The Court has accepted the “*principle*” of reservations in promotions, so reservations in promotions to the highest levels in all services are valid...

Permission to relax the minimum standards has become a mandate to grant preference: “If members of Scheduled Castes and Scheduled Tribes, who are said by this Court to be backward classes, can maintain minimum necessary requirements of administrative efficiency, *not only representation but also preference may be given to them to enforce equality and to eliminate inequality...* The basic concept of equality is equality of opportunity for appointment. *Preferential treatment* for members of backward classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens....”² Apart from noticing the way “the principle” is being stretched – from “permission to relax” to giving preference – notice the switch from “Scheduled Castes and Scheduled Tribes” to the much more expandable “backward classes”.

¹*State of Kerala v. N.M. Thomas, op. cit.*, at 343, para 64.

²*Ibid*, at 337-38, para 44.

And what is necessary for ensuring efficiency of administration has by now been made to stand on its head. It used to be that to ensure efficient administration, the State must assign the job to "*those who are best qualified to do it.*" This became, "those who have *the minimum qualifications to do it.*" This became, "those who have *the potential to acquire* the minimum qualifications in *the specified period.*" This became, "those who have the potential to acquire the minimum qualifications in the course of the period *as extended.*" This became, "those who have the potential to acquire the minimum qualifications in the course of the period *as extended from time to time.*" This has by now become, "those who have entered the service through reservations, or have been promoted against the reserved quota must be *presumed to have the necessary qualifications,*" and furthermore that "he who raises a doubt about any of them must establish that *he* is not actuated by anti-SC/ST/OBC bias." And *that*, as we shall soon see, has been carried further by the proposition that "efficiency of administration" does not mean what it has been taken to mean!

From that it has been but a tiny step to dismissing anyone who questions what is being done with a pejorative query: "How can any member of the so-called forward communities complain of a compensatory measure made by Government to ensure the members of Scheduled Castes and Scheduled Tribes their due share of representation in public services?" the reader is asked to explain in *N.M. Thomas*.¹

And, as we shall soon see, it is an even shorter hop from that pejorative wonderment to the charge of downright prejudice, indeed of conspiracy to perpetuate dominance over, and exploitation of the poor.

"Less than 50 per cent," or "A minimum of 50 per cent," or...

The proviso of Article 15(4) to the fundamental right to equality, the Supreme Court said in *M.R. Balaji*, has been provided because the interests of society as a whole will be better served if special measures are taken to lift the socially and educationally backward classes. But the exception cannot be allowed to swallow the rule. It recalled what the University Education Commission had stated: that the interests of

¹*Ibid*, at 346, para 74.

the country as a whole would be gravely jeopardized if standards were allowed to be lowered; that accordingly reservations in educational institutions ought to be limited to one-third; and that they should be adopted for only ten years.

The Court recalled how the Chairman of the Backward Classes Commission, even as he forwarded the Report of the Commission, had expressed the gravest doubts about the remedy – reservations based in effect on caste – that was being recommended. He had written that this would, on the one hand, perpetuate the caste system and, on the other, exclude persons from religions other than Hinduism who were equally deprived but whose religions had ostensibly done away with caste. His eyes had been opened as he reflected upon the consequences of the proposals, he wrote; this had given him “a rude shock” and had driven him to conclude that “the remedies suggested by the Commission were worse than the evil it was out to combat.”

The Court recalled that the Report of the Commission had been deliberated upon by the Central Government – all this was in the mid-fifties, remember, when Pandit Nehru was at the zenith, the very same Pandit Nehru whose every word we are otherwise asked to laud and follow. “The Memorandum issued by the Government of India on the Report of the Commission points out that it cannot be denied that the caste system is the greatest hindrance in the way of our progress towards an egalitarian society, and the recognition of the specified castes as backward may serve to maintain and even perpetuate the existing distinctions on the basis of castes,” the Supreme Court pointed out. The Government’s Memorandum also found fault with the criteria that had been used by the Commission for identifying those who had to be helped.¹

The Central Government had then written to the Government of Mysore on the subject of reservation of seats under Article 15(4). In this communication, the Central Government had pointed out that the All India Council for Technical Education had recommended that the reservation for Scheduled Castes and Scheduled Tribes and other backward communities may be up to 25% with marginal adjustments not exceeding 10% in exceptional cases. The Central Government

¹*M.R. Balaji v. State of Mysore*, 1963 Supp (1) SCR 439, para 13.

had, therefore, suggested that in all non-Government institutions in the State, the reservations under Article 15(4) should not in any case exceed 35%.¹ In fact, the Supreme Court observed, "In this particular case it is remarkable that when the State issued its order on 10-7-1961, it emphatically expressed its opinion that the reservation of 68% recommended by the Nagan Gowda Committee would not be in the larger interests of the state. What happened between 10-7-1961, and 31-7-1962, does not appear on the record. But the state changed its mind and adopted the recommendation of the Committee ignoring its earlier decision that the said recommendation was contrary to the larger interests of the state...." After a detailed consideration of the constitutional provisions as well as of the evolution of government orders and the reports of various committees, the Supreme Court struck down the 68 per cent reservation as "plainly inconsistent with Article 15(4)...."

That is how it came to observe, "Speaking generally and in a broad way, a special provision should be less than 50 per cent; how much less than 50 per cent would depend on the relevant prevailing circumstances in each case..."² And the Court emphasized that what applied to Article 15(4) applied with equal rigour to Article 16(4) as the two were part of the same scheme – that of enabling the State to institute special measures to lift the backward classes.

Today everyone takes it as axiomatic that 50 per cent has to be set apart in services on the basis of birth, as if it is something which has been not just sanctioned but sanctified by the courts, if not the Constitution itself.

As we have just seen, the case in which the figure originated had nothing to do with reservations in services. And even in that case the figure was put out not as the result of an analysis of what the profession required or of what would be fair and just. It came in as a remark to illustrate the proposition that an exception to a rule cannot be so large as to swallow the rule itself.

Recall that Article 15(1) of the Constitution forbids any discrimination on grounds of religion, race, caste, sex, place of birth. Article 15(4) says that notwithstanding this general rule, the State may

¹*Ibid*, para 14.

²*Ibid*, para 34.

make "any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

Mysore had already reserved 15 per cent of the seats in medical and engineering colleges and other technical institutes for the Scheduled Castes, and 3 per cent for the Scheduled Tribes. It passed a new order reserving another 50 per cent for Most Backward Castes. That meant that the *exception* – that is, reservations under Article 15(4) – became larger than the rule – the prohibition, that is, in Article 15(1) against discrimination on grounds of caste, etc.

It is in illustrating this matter that the Supreme Court talked of 50 per cent. It did so illustratively, tentatively, "speaking generally and in a broad way," as it said.

The language itself shows that the Court was merely illustrating the arithmetical point. Its view of what was being sought to be done was stern:

Therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4)... that the Constitution-makers assumed... that while making adequate reservation under Article 16(4), *care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction amongst the employees, materially affect efficiency*. Therefore, like the special provision improperly made under Article 15(4), reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as fraud on the Constitution.

But that arithmetical illustration became the norm. The very words, "speaking generally and in a broad way" came to be used to assert that even 50 per cent need not be the limit as the Court had not specified any hard and fast rule.

At first the ceiling.

That becomes the floor.

That floor becomes a right.

That right having already been secured becomes the base from which to wrest more.

That it has been wrested in educational institutions becomes the rationale for demanding, and soon getting it in services...

A word is inserted

The orders under challenge had raised reservations in promotions to $66\frac{2}{3}$ per cent of the vacancies.¹ This was well over the 50 per cent that had been accepted and applied by the Supreme Court since *Balaji*. Justice Krishna Iyer now held that, in any given year reservations should not be “*substantially* more than 50 per cent of the promotional posts,” and that as the reservations decreed by the Railways and to be carried forward – $66\frac{2}{3}$ per cent! – shall not be “*considerably* in excess of 50 per cent,” they were constitutional!²

Justice Krishna Iyer's justification was twofold. For one thing, he maintained, as the earlier prescriptions and limits had not got the Scheduled Castes and Tribes their due share in State power, more had to be done – by not taking too rigid a view of any upper limit, by further diluting what was being asked of these sections by way of qualifying standards, etc. “Law is what law *does*,” he said. The “reluctant relaxation” of standards in the earlier order had not worked. “Constant monitoring of law-in-action, with an eye on the end result is social engineering.” As the earlier relaxations and reservations had not secured the desired “end result”, higher reservations and further relaxations are justified.

Second, he maintained, the word should really be “asserted”, that the higher reservations, the even greater relaxations, the carry forward for three years even in promotions “would not materially affect the stream of ‘merit-worthy’ candidates, nor substantially diminish the prospects of non-SC & ST candidates in a given year.”³ In his concurring judgment, Justice Chinnappa Reddy was even more dismissive:

Every lawful method is permissible to secure the due representation of the Scheduled Castes and Scheduled Tribes in the Public Services. There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not be *far in excess* of fifty per cent. There is no rigidity about the fifty per cent rule which is only a convenient guideline laid down by Judges. Every

¹C.f., *Akhil Bharatiya Soshit Karamchhari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 298, para 96.

²*Ibid*, at 296, para 88.

³See, for instance, *Ibid*, at 273-74, paras 44, 45.

case must be decided with reference to the present practical results yielded by the application of the particular rule of preferential treatment and not with reference to hypothetical results which the application of the rule may yield in the future...¹

And in support, he cited what the Supreme Court had held in *State of Punjab v. Hira Lal*. In that case, the Punjab High Court had pointed to the anomalies that would arise as juniors jumped over their seniors – not because of merit but by virtue of having been born to one set of parents rather than another – and the consequential demoralization that would set in. The Supreme Court had reversed the High Court's verdict, saying:

The extent of reservation to be made is primarily a matter for the State to decide. By this we do not mean to say that the decision of the State is not open to judicial review. The reservation must be only for the purpose of giving adequate representation in the service to the Scheduled Castes, Scheduled Tribes and Backward Classes... The mere fact that the reservation made may give extensive benefits to some of the persons who have the benefit of the reservation does not by itself make the reservation bad. *The length of the leap to be provided depends upon the gap to be covered.*

* * *

There was no material before the High Court and there is no material before us from which we can conclude that the impugned order is violative of Article 16(1). Reservation of appointments under Article 16(4) cannot be struck down on hypothetical grounds or on imaginary possibilities. He who assails the reservation under that article must satisfactorily establish that there has been a violation of Article 16(1).²

In the event, *Hira Lal* has been over-ruled in *Indra Sawhney*!

Another avenue

Soon, the Court was confronted with another way of getting around the 50 per cent limit. This was the "carry forward rule", to which we have just seen references. Assume that this year 50 per cent seats had been reserved, but that only 30 per cent could be filled as the remaining candidates, even after the relaxation of minimum

¹ *Ibid*, at 315, para 135.

² *State of Punjab v. Hira Lal*, (1970) 3 SCC 567, at 572-73.; cited in *Akshil Bharatiya Soshil Karamchhari Sangh (Rly.) v. Union of India*, *op. cit.*, at 313-14, para 132.

standards, just could not be found. The position was taken that these unfilled 20 per cent must be “carried forward” to the next year. The result was that next year, not 50 per cent but 70 per cent seats would be reserved. If again only 60 per cent of these could be filled in that year, in the third year, 80 per cent seats would get reserved, and so on.

And remember that governments now, specially before each bout of elections, go in for “special recruitment drives” in which only persons from the reservation-castes can apply. So, there is the effect of 50 per cent reservation; plus of what has been carried forward from previous years; plus of the “special recruitment drive”; plus of the ruling that those members of these castes who qualify on merit, even though they have availed of relaxations like those relating to age, qualifying marks, etc., shall be counted not in the 50 per cent reservation quota but in the general category.

The compound effect can scarcely be believed. In October/November, 2005, the Rajasthan Government decided to recruit 33,000 teachers for primary schools. Affidavits filed in the High Court and Supreme Court indicate that of the 33,000 posts, *only nineteen hundred* were filled by candidates from castes that have not secured reservations! Even government sources do not put the figure higher than 6000 or so.

The “carry forward” device was challenged. In *Devadasan*, the Supreme Court decisively struck down the carry forward rule as unconstitutional, and held that the 50 per cent ceiling would apply to the carry forward rule also, that each year would have to be considered by itself. Article 15(4) is an exception to Article 15(1) and cannot be allowed to swallow the rule.¹

Justice K. Subba Rao dissented. Equality of opportunity can be ensured only if special advantages are given to the downtrodden or real handicaps are put on the better off, he reasoned. Articles 15(4) and 16(4) are *not* exceptions. On the contrary, they confer a power untrammelled by the main provisions in each case. The Article – 335 – that prescribes that the requirements of efficient administration have to be kept in mind while helping SCs and STs, he declared, has nothing to do with Article 16(4). The State can make “*any* provision

¹*T. Devadasan v. Union of India*, AIR 1964 SC 179; in particular, paras 13, 15, 16, 20.

for reservations or posts" – there is no *a priori* limit. Individuals from higher castes will inevitably be put to hardship, he said; but this is inherent in the scheme of reservations... Standards will be adversely affected, he acknowledged, but this too is inherent in the scheme of reservations. How much deterioration in standards the State is prepared to countenance will be contained in the minimum qualifications it lays down. The very words that the Court had used in *Balaji*, he maintained, "speaking generally", "broadly" showed that all it was doing was suggesting a "workable guide" and that it was not laying down "an inflexible rule of law."¹

No time for caution

The matter continued to go in and out of courts. Some judges continued to caution against the enthusiasm that was coming to sway the Court. They continued to draw attention to the twin dangers that would inevitably follow once the scheme of the Constitution was stretched in the way it was being stretched – that the fundamental guarantee to equality would be rendered a nullity, that governance would be seriously impaired and, soon enough, this deterioration would injure the downtrodden as much as anyone else. Thus, to take just one example, Justice A.P. Sen pointed out in *Vasanth Kumar*, that the State must pay heed to both objectives of the Constitution, namely, efficiency of administration and equality for all persons. The Preamble "shows the nation's resolve to secure *to all its citizens*: Justice – social, economic, political....," italicizing the words "to all its citizens." He warned, "The State's objective of bringing about and maintaining social justice must be achieved reasonably having regard to the interests of all. Irrational and unreasonable moves by the State will slowly but surely tear apart the fabric of society. It is primarily the duty and function of the State to inject moderation into the decisions taken under Article 15(4) and 16(4), because justice lives in the hearts of men and a growing sense of injustice and reverse discrimination, fuelled by unwise State action, will destroy, not advance, social justice. If the State contravenes the constitutional mandates of Article 16(1) and Article 335, this Court will, of course, have to perform its duty." The Constitution does not contemplate that representation

¹*Ibid*, in particular, paras 22, 23, 24, 26, 27, 29, 30.

of a class in governmental services shall exactly correspond to its share in the population, it aims just at securing adequate representation, he emphasized.¹

In full swing

But by now progressives were in full swing. Reservations under Articles 15(4) and 16(4) are for classes that are inadequately represented, Justice O. Chinnappa Reddy began. The purpose of these Articles is to secure adequate representation. The percentage that is permissible is, therefore, to be determined by reference to the extent of that inadequacy. "Naturally, if the lost ground is to be gained, the extent of reservation may even have to be slightly higher than the percentage of population of the backward classes," he declared. Whether the limit should be 40 per cent, 50 per cent or 60 per cent, he said, "is a matter for experts in management and administration."

The real import of that observation was manifest in the next sentence! As such, for the Court to lay down a limit would be "arbitrary", the Judge said, "and the Constitution does not permit us to be arbitrary." In *Balaji* itself the Court had been circumspect, he said. It had been careful to say that in indicating the limit of 50 per cent, it was "speaking generally and in a broad way." Therefore, Justice Chinnappa Reddy maintained, "We are not prepared to read *Balaji* as arbitrarily laying down 50% as the outer limit of reservation."

Notice how he comes to that word, "arbitrarily": laying down a limit would be "arbitrary", he says; the Constitution does not permit us to be arbitrary; hence, if the Supreme Court in *Balaji* laid down a limit, which it did not, then it would have been "arbitrary" in doing so! Hence, there is no limit!!

"We must say here what we have said earlier, that there is no scientific statistical data or evidence of expert administrators who have made any study of the problem to support the opinion that reservation in excess of 50% may impair efficiency...", he said, having in the paragraph immediately preceding this one relied on that leftist oracle, *Monthly Review* – no doubt "scientific statistical data or evidence"! He did magnanimously add though, "Our observations

¹K.C. Vasant Kumar v. State of Karnataka, (1985) Supp. SCC 714, at 770-72, paras 85 to 87.

are not intended to show the door to genuine efficiency. Efficiency must be a guiding factor but not a smoke screen..."¹ Given his mode of reasoning, and his penchant for pasting motives and pejoratives on anyone who did not buy into his brand of progressivism, we can be certain that anyone who demurred at what he was prescribing would have been held guilty of using efficiency as a smoke screen, and worse.

In *N.M. Thomas*, Justice Fazal Ali went a step further. "As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases," he said. "Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50 per cent. As I read the authorities, this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80 per cent of the population and the Government, in order to give them proper representation, reserves 80 per cent of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of clause (4) of Article 16? The answer must necessarily be in the negative. The dominant object of this provision is to take steps to make inadequate representation adequate."² So, 80 per cent it could be!

Incidentally, in *Indra Sawhney*, Justice R.M. Sahai punctures the assertion of Justice Fazal Ali, and the "reasoning" of Justice Mathew with a pinprick! He points to the bare words of Article 16(4): had the framers intended that reservations should be proportionate to the share of a group in the country's population, they could easily have ensured that by adding four brief words, "in proportion to it," in the Article. Furthermore, he draws attention to the inspiration of Justice Mathew's proposition of "proportional equality": "In *Thomas Mathew, J.* introduced the concept of proportional equality from two American decisions *Griffin* and *Harper*. None of the decisions were concerned with affirmative action. The one related to payment of

¹*Ibid.*, at 745-46, 751-52, paras 49, 57, 58.

²*State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 387, para 191.

charges for translation of manuscript in appeal and other with levy of poll tax at uniform rate indiscriminately. In view of clear phraseology and the background of enactment of Article 16(4) any interpretation of it on the ratio of American decisions cannot be of any help. Our Constitution does not approve of proportional representation either in services or even in Parliament as is illustrated by Article 331 of the Constitution which empowers the President to nominate not more than two members of the Anglo-Indian community to the House of the People, irrespective of their population, if they are not adequately represented..."¹ We need only add that such suborning of any decision or passage that will come in handy from foreign courts, in this case American courts, is standard practice, as is the denunciation of reliance on foreign cases when *that* better serves the cause!

But to proceed with the progressives: Justice Krishna Iyer added his weight to the proposition, saying, "I agree with my learned Brother Fazal Ali, J., in the view that the arithmetical limit of 50 per cent in any one year set by some earlier rulings cannot perhaps be pressed too far. Overall representation in a department does not depend on recruitment in a particular year, but the total strength of a cadre. I agree with his construction of Article 16(4) and his view about the 'carry forward' rule."²

The 50 per cent limit again became a matter of great contention in subsequent cases, and it seemed for a while that the breaches that these few judges had made in the dyke would lead the Court to break it completely. Fortunately that did not happen. After giving an exhaustive summary of what had been held by the Supreme Court in different judgments, and by what different judges had held in *N.M. Thomas*, Justice E.S. Venkataramiah observed in *K.C. Vasanth Kumar*, "After carefully going through all the seven opinions in the above case, it is difficult to hold that the settled view of this Court that the reservation under Article 15(4) or Article 16(4) could not be more than 50 per cent has been unsettled by a majority on the Bench which decided this case." He did not pursue the point on the ground that "if reservation is made only in favour of those backward castes or classes which are comparable to the Scheduled Castes and Scheduled Tribes,

¹*Indra Sawhney, op. cit.*, at 618, para 614.

²*State of Kerala v. N.M. Thomas, op. cit.*, para 143.

it may not exceed 50 per cent (including 18 per cent reserved for the Scheduled Castes and Scheduled Tribes and 15 per cent reserved for "special group") in view of the total population of such backward classes in the State of Karnataka" – a point to which we shall have occasion to return.¹

But *Vasanth Kumar* was just an advisory opinion, it came to be asserted. And the progressives had not abandoned the point.

First off, the Supreme Court has accepted the proposition that if any candidate belonging to the castes for which reservations have been made qualifies on merit, he shall *not* be taken to belong to the reserved category. He will be treated as an "open competition candidate", and to that extent the proportion of persons from that caste who will get in will be higher than the proportion of seats that have been reserved.²

Justice Ratnavel Pandian will have none of this mealy-mouthed revolution. He rejects the proposition wholesale that reservations must not exceed 50 per cent on the ground that the observation to this effect in cases such as *Balaji* is just *obiter dicta*. He allows only that reservations should not be 100 per cent! "As to what extent the proportion of reservation will be so excessive as to render it bad," Justice Pandian holds, "must depend upon adequacy of representation in a given case. Therefore, the decisions fixing the percentage of reservation only up to the maximum of 50% are unsustainable. The percentage of reservation at the maximum of 50% is neither based on scientific data nor on any established and agreed formula. In fact, Article 16(4) itself does not limit the power of the Government in making the reservation to any maximum percentage; but it depends upon the quantum of adequate representation required in the Services."³

Justice Sawant heads in the same direction, but slows down a bit at the penultimate moment! He recalls Justice Hegde's observation in *Hira Lal*: the length of the leap to be provided, Justice Hegde had said, depends upon the gap that is to be covered. Backwards constitute 77½ per cent of the population, Justice Sawant notes, but adds that even during the Constituent Assembly Debates no one

¹*K.C. Vasanth Kumar v. State of Karnataka*, *op. cit.*, at 810, para 148.

²For instance, *Indra Sawhney*, *op. cit.*, at 735, para 811.

³*Ibid.*, at 411, para 183.

suggested that reservations must be in proportion to the share of a group in the population.¹

*"Adequate representation" for certain castes,
or for those among them who are by definition not qualified?*

A typical twist was soon added to the "50 per cent" rule. Recall the objective that is embedded in Article 16(4): the Article permits the State to reserve posts for a backward class of citizens "which, in the opinion of the State, *is not adequately represented in the services under the State.*"

The Punjab Government had instituted 22 per cent reservation for members of Scheduled Castes and Tribes and Backward Classes in a service. The cadre strength was of 202 posts. In accordance with the 22 per cent reservation, members of Scheduled Castes were entitled to 42 posts. There were already 47 Scheduled Caste members in the category in question. Reasoning that ten of these had been promoted on seniority-cum-merit, the Government decided that SCs were represented in the service not to the extent of 47 posts against the entitlement of 42 posts, but only 37 posts. Accordingly, it promoted another lot. The promotions were struck down in *Joginder Singh Sethi v. Government of Punjab*.² The judgment was in turn struck down in appeal – first by the Punjab and Haryana High Court, and then by the Supreme Court.

The matter came up again before the Supreme Court in *R.K. Sabharwal*. The Court held that those who get into the service (or, when the matter concerns promotions to a grade, get promoted) on the basis of seniority-cum-merit shall *not* be counted while determining the extent to which a reserved quota has been filled. They will be counted in the general category. The Court gave two reasons for the ruling.

First, it said, Article 16(4) allows the State to make "*any provision*" for reservations for classes that are not adequately represented in its services. Hence, if the State makes a provision to the effect that those who make it on seniority-cum-merit shall not be counted against the reserved quota, that is it. Second, it said, the fact that the castes or

¹*Indra Sawbney, op. cit.*, at 543, para 495.

²(1982) 2 Serv LR 307.

classes for which reservations have been instituted already account for more than the proportion reserved for them, "may be a relevant factor for the state government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the backward classes are operative, the same have to be followed."¹

The result has been predictable. And we shall soon catch glimpses of it.

The point bears reflection. Recall once again what the objective of Article 16(4) is: it is to enable the State to institute reservations for the backward classes that are not adequately represented in the services under the State. Assume that caste "X" – "class X", if you want to stick to the fiction – is not adequately represented in a service under the State. The State decrees that "Y" per cent of the posts in the service – or, in the case of promotions, "Y" per cent of the posts at that particular level in the service – shall be reserved for caste "X". Assume that individuals "Z-1" to "Z-20" belong to that caste. If they make it into the service or to that higher grade because they are senior enough or because they are found to have the requisite merit, do they cease being members of caste "X"? Certainly not if we go by what the progressive judges have been asserting: haven't they been insisting that no one can change his caste? This being the "reality", when the government is ascertaining whether caste "X" is "adequately represented" in the service (or at that higher level of the service) or not, by what logic are they to be excluded from caste "X"?

Is the quota for that caste/class? Or for *those members of that caste/class who do not have the qualifications required for the service or the post?*

By the grace of the Supreme Court in *R.K. Sabharwal*, the objective of Article 16(4) is no longer that a specified caste or class shall be adequately represented in the service. The objective is that *those members of this caste or class who cannot make it on their own shall be adequately represented!*

Notice also, the dissonance with what is the law in related contexts. How is the "carry forward" rule justified? Vacancies that could not be filled for want of a sufficient number of candidates are to be "carried

¹ *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745, para 4.

forward" to subsequent years on the ground that the extent of representation that is to be counted is not in vacancies that arise in a single year, but the extent of representation *in the cadre as a whole*. In the case at hand, by contrast, the Court has held that it shall *not* look at the extent of representation in the cadre as a whole! Even when "A+B" per cent of the posts in the service are already manned by the caste/class as against the "A" per cent reserved for it, more members of the caste shall continue to be inducted – provided they do not qualify for the service or post on their own!

In the event, the majority of the judges in *Indra Sawhney*, declared that the totality of seats that are reserved in a given year must not exceed 50 per cent – that is, the per cent that is reserved as well as the per cent that is carried over.

As has been the unvarying pattern, the little that the judges left, the political class finished. By the 81st Amendment to the Constituion, a new clause was added to Article 16: clause 4B. This clause, as we have seen, reads:

Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) *as a separate class of vacancies* to be filled up in any succeeding year or years and such class of vacancies *shall not be considered together with the vacancies of the year* in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

Promotion: just a facet of recruitment!

The sequence has been entirely predictable. Initially, reservations were confined to recruitment. By 1955, they started creeping into promotions also, albeit in regard to lower posts, and these in peripheral services. The way the courts came to give their imprimatur to this extension tells much about the extent to which exhibitionist egalitarianism had come to hold sway. Recall the two provisions of the Constitution that bear on the matter.

Article 16(1) is entitled, "Equality of opportunity in matters of public employment". It lays down,

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

Of the expressions in it, notice three: "equality of *opportunity*," "matters relating to *employment*" and "*appointment* to any office under the State."

Article 16(4) lays down,

Nothing in this Article shall prevent the State from making any provision for the reservation of appointment or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Of the expressions in this clause, notice two: "*appointment*" and "*posts*".

It has been accepted all along that the ambit of Article 16(1) is wider than that of Article 16(4). This is because of the expression, "matters relating to employment" used in the former. This expression, the Court has noted in successive judgments, covers salary, periodical increments, leave, gratuity, pension, the age at which an employee will retire. There has been no dispute that in regard to each of these,

there shall be equal treatment of all employees. The State cannot invoke Article 16(4) and decree preferential salaries, pensions, etc. to members of one class *vis a vis* another.

The can of difficulties got opened quite early on. In *Rangachari*, the Supreme Court split three to two. The majority took the view that Article 16(1) must be "construed in a broad and general, and not pedantic and technical way." As such it read into those two expressions – "matters relating to employment" and "posts" – special meanings which became the instrument of much elongation in the years to follow.

"Matters relating to employment", the three Judges held, must be taken to cover "all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment." And that the right and opportunity to be promoted to higher posts within a service is a matter that flows from, is implicit in and is incidental to being inducted into that service.

Second, they emphasized, clause 4 of the Article uses "appointments" and "posts" separately. There is a long legislative history to the word "posts". For decades even before Independence, it was used to refer to posts that were created from time to time *outside* a service. And that practice continues to this day. In U.P., for instance, Government rules provide for "X" number of Inspectors General of Police. Over the years, for a variety of reasons – ranging from expansion of the functions that have to be discharged to the need to accommodate officers who cannot be given higher responsibilities yet must be given higher perks and positions – "X+Y" officers are appointed as IGs. The number "Y" are known as "ex-cadre posts", and the expression "posts" has always been taken to refer to these positions that have been created outside the service.

The three Judges, however, held that the word "posts" must be taken to refer to positions at different levels within a service. They gave a circumstantial reason for this construction. Article 16(4) is intended to provide adequate representation in government services to classes that are inadequately represented in the services. If "posts" is taken to refer to positions outside the services, then reserving a proportion in them can never cure that inadequacy. Hence, by "posts" the framers must have meant positions at different levels in the

service. And, therefore, reservations are valid not just at the stage of appointment but in promotions also.

In putting these expanded constructions on the two expressions, the Judges were guided by their belief, as we just noted, that "the Constitution has, if we may say so wisely, showed very great solicitude for the advancement of socially and educationally backward classes of citizens." And that, therefore, Articles 16(1) and 16(4) must be "construed in a broad and general, and not pedantic and technical way."

The two dissenting Judges gave cogent reasons to show that these constructions were not warranted, and would cause much ill. They pointed to the long legislative history of "posts". They pointed to its usage at the time. Justice K.N. Wanchoo furnished an additional reason on account of which the word had been used in addition to "appointment". By "posts" the framers meant the total number of posts in a service, he maintained. They had wanted to secure adequate representation in the services for these sections. If they had confined reservation to just the number that were being recruited in a given year, the effect could well be that for long the sections would remain under-represented in those services – the number recruited in a year would necessarily be a small fraction – say, a twentieth – of the total number in the service; setting aside a third – that is, a third of twentieth – for these sections would mean that it would take too long to secure adequate representation for them. That is why, he reasoned, the framers added the word "posts" – so that reservation could be made for numbers exceeding what would be warranted merely by the numbers being recruited in a particular year.

Both Judges pointed out that Article 16(4) is an exception to the fundamental right to equality that is guaranteed to every citizen by Article 16(1); that it is a well accepted rule of construction that "a restriction on a guaranteed right should be narrowly construed so as to afford sufficient scope to the freedom guaranteed"; that "the proviso or exception should not be interpreted so liberally as to destroy the fundamental right itself to which it is a proviso or exception," or to render it "practically illusory".

Justice K.N. Wanchoo gave a telling example of the sorts of anomalies that would result from the construction that the majority was putting on the expressions. The cumulative effect of the

constructions being advanced by the three Judges was that the Constitution aimed at ensuring "adequate representation" for the socially and educationally deprived at every level of a service. "In some of the top grades there are single posts in the service," he pointed out. "If at any point of time the incumbent is not a member of the backward class, it would certainly be the case of inadequate representation as regards that post which would mean that such posts which are single may be reserved for all time to be held by members of the backward classes, because if at any moment such a person ceases to hold the post there would be inadequate representation in regard to that post."¹

However, 3 to 2 is 3 to 2. *Rangachari* endorsed reservations in promotions. The three Judges held that, in deciding that the educationally and socially backward classes were not adequately represented in its services, the State "may refer either to numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation." "The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services," the three Judges said, "but that they should aspire to secure adequate representation in selection posts in the services as well. In the context the expression 'adequately represented' imports considerations of 'size' as well as 'values', numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. It is thus by the operation of the numerical and a qualitative test that the adequacy or otherwise of the representation of backward classes in any service has to be judged; and if that be so, it would not be reasonable to hold that the inadequacy of representation can and must be cured only by reserving a proportionately higher percentage of appointments at the initial stage."² What a breakthrough! Posts up to the highest level must be reserved for sections that, their other characteristics apart, are, by definition, *educationally* backward.

The Central Government considered the verdict and issued a

¹On all this, *General Manager, Southern Railway v. Rangachari*, 1962 AIR 36 1962 SCR (2) 586; in particular para 43.

²*Ibid*, at 596, para 25.

Government Order to the effect that there would *not* be reservations in promotions.

But as the '70s commenced, "commitment" was the badge that the judiciary was asked to display, and many revelled in doing so. The Constitution has directed the State to promote the economic and educational interests of the downtrodden "with special care", these judges recalled. The way to ensure their economic interests is to give them a share in power. To give them a share in power, we must give them a share in positions of the State apparatus. But as power lies in the top echelons, we must give them a share in the higher posts.

In *N.M. Thomas*, as we have noted, Judges other than Justice H.R. Khanna and Justice A.C. Gupta, staked out the progressive position. The Chief Justice, A.N. Ray, whose role during the Emergency is well remembered as a blot on the judiciary, Justice Fazal Ali and, of course, Justice V.R. Krishna Iyer held that, to quote Justice A.N. Ray's words, "In regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment and even in regard to such promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens." He did caution, however, that, while reserving a proportion of promotions, Government must bear in mind the impact that step would have on the efficiency of administration because "It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration."

Justice Fazal Ali was not to be held back by any caveats. Because of Articles 14 and 16, equality permeates "the whole spectrum of an individual's employment," he said, "from appointment through promotion and termination to the payment of gratuity and pension." The Government, accordingly, has full authority to classify employees in different categories, and, within a class, institute measures in favour of Scheduled Castes and Tribes and OBCs so as to ensure real equality.¹

Justice Krishna Iyer returned to the matter in *Akhil Bharatiya Soshit*

¹*State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 at 333, 381-82, paras 28, 29, 171-76.

Karamchhari Sangh. He embellished the rhetoric, and enlarged the right.

First he invoked the non-enforceable Directive Principles. "Every Directive Principle is fundamental in the governance of the country and it shall be the duty of the State to apply that principle in making laws," he said. Article 46, he said, "in emphatic terms, obligates the State" "to promote *with special care* the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation." When Article 46 and Article 16(4) are read together, "the luscious intent of the Constitution-framers emerges that the exploited lot of the *harijan-girijan* groups in the past shall be extirpated with special care by the State." The Judge maintained that the inference is "obvious", and it is that "administrative participation by SC & ST shall be promoted with special care by the State."

Justice Krishna Iyer did add the chant, "Of course, reservations under Article 16(4) and promotional strategies envisaged by Article 46 may be important but shall not run berserk and imperil administrative efficiency in the name of concessions to backward classes. Article 335 enters a caveat in this behalf..."¹ But this is just a chant. Almost every progressive judge adds words to this effect even as he puts his seal to measures which cannot but imperil administrative efficiency.

And this becomes clear just a few paragraphs later. The Judge notes with approval, "Government moved further because real power could be shared by the weakest sections only if the doors of the higher decks were opened to them. The higher echelons are the real controllerates, not the menial levels, hierarchically structured as our society is." "Obviously, Article 16(4) was not designed to get more *harijans* into Government as scavengers and sweepers," the Judge specified, "but as 'officers' and 'bosses', so that administrative power may become the common property of the high and low, homogenized and integrated into one community. Social stratification, the bane of the caste system, could be undone and vertical mobility won not by hortative exercises but by experience of *shared* power."²

¹*Akhil Bharatiya Soshit Karamchhari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 270, para 36.

²*Ibid*, at 274, para 46.

Eight out of eight

The matter remained one of contention. In *Indra Sawhney*, eight of nine judges held that reservations in promotions were unconstitutional – the ninth judge did not participate on this issue. But five of the eight said that the reservations that existed – including those in promotions – would continue for five years. By the 77th Amendment the Constitution was changed. A new Article 16(4A) was added which explicitly allows reservations in promotions also.

We should pause for a moment and reflect on the reasons that the eight judges who pronounced on the matter gave for holding that there should be no reservations in promotions. Examining them a decade later will awaken us to the damage that has been done by the political class – to the fact that it had all the warnings to cease and desist, and yet it went ahead and decreed the exact, ruinous measure. Examining what the Court said will also lead us to see an all-important lesson: the slightest compromise – by the judiciary, but even in discourse – and the political class will grab it as a handle to pervert things further.

The Court noted that in *Rangachari*, it had held that reservations are permissible even in promotions as Article 16(4) contemplates that representation of different sections in government employment must be adequate not just “quantitatively” but also “qualitatively”. *Rangachari* had disposed of the requirement imposed by Article 335 “on a basis which is not acceptable,” the Supreme Court said pointedly. In *Rangachari*, the risk that such reservations would adversely affect efficiency of administration had been dismissed with the remark, “but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts.” “But we see no justification to multiply ‘the risk’, which would be the consequence of holding that reservation can be provided even in the matter of promotion,” the Court said. “While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, *it would be a serious and unacceptable inroad into the rule of equality of opportunity* to say that such a handicap should be provided at every stage of promotion throughout their career.”

There was an important reason both in law, and in practice: once members join a service, they are one class; to give a permanent advantage to some because of their birth would split them into different classes; in practice, such fractionalization will damage governance. *"That would mean creation of a permanent separate category* apart from the mainstream – a vertical division of the administrative apparatus," the Court observed. "The members of reserved categories need not have to compete with others but only among themselves. *There would be no will to work, compete and excel among them.* Whether they work or not, they tend to think, their promotion is assured. This in turn is *bound to generate a feeling of despondence and 'heart-burning' among open competition members.* All this is bound to affect the efficiency of administration. Putting the members of backward classes on a fast-track would necessarily result in leap-frogging and the deleterious effects of 'leap-frogging' need no illustration at our hands." Therefore, said the Court, "At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their 'birth-mark', as one of the learned Judges of this Court has said in another connection. *They are expected to operate on equal footing with others. Crutches cannot be provided throughout one's career.* That would not be in the interest of efficiency of administration nor in the larger interest of the nation."

Would this not mean that the reserved category employees would be forever confined to the lower rungs of the services? The Court refuted the apprehension: meritorious persons could always be inducted at higher levels through direct recruitment, it pointed out. And gave two reasons, one valid, and the other an element of that fatal compromise. First, it pointed out, "during the debates in the Constituent Assembly, none referred to reservation in promotions; it does not appear to have been within their contemplation."

Next, it said that the fact that the reservationists may not make it to the higher posts could be made up through direct recruitment to those levels, and by decreeing reservations in that direct recruitment: "It is well-known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class IV and Class III.

Direct recruitment is provided even at the level of All India Services. Direct recruitment is provided at the level of District Judges, to give an example nearer home." We shall soon see where this leads.

The Court was fully cognizant of the arguments that had been advanced and the attempts that had been made to move jurisprudence in the opposite direction, but it was certain that course would be neither constitutional nor wise: "It is true that *Rangachari* has been the law for more than 30 years and that attempts to re-open the issue were repelled in *Karamchari Sangh*," it said. "It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and state services but we are convinced that the majority opinion in *Rangachari* to the extent it holds, that Article 16(4) permits reservation even in the matter of promotion, is not sustainable in principle and ought to be departed from." Reservations in promotions would result in "invidious discrimination", it said.

"Betrays the present as well as the future of the nation"

Apart from the unconstitutionality, the Court was gravely concerned about the way reservations in promotions would affect governance. "To be overlooked at the time of promotion in favour of a person who is junior in service and having no claim to superior merits," the Court stressed, "is to cause frustration and passionate prejudice, hostility and ill will not only in the mind of the overlooked candidate, but also in the minds of the generality of employees. Any such discrimination is unfair and it causes dissatisfaction, indiscipline and inefficiency."

Article 335, the Court reminded us, requires that "in the making of appointments to services and posts in connection with the affairs of the Union or of a state" the claims of the members of the Scheduled Castes and the Scheduled Tribes must be considered "consistently with the maintenance of efficiency of administration". "If that is the constitutional mandate with regard to the Scheduled Castes and the Scheduled Tribes, the same principle must necessarily hold good in respect of all backward classes of citizens," it pointed out, adverting to the Government Order that was in question before it. "The requirement of efficiency is an overriding mandate of the Constitution. An inefficient administration betrays the present as well as the future of the nation."

"It is foolhardy to ignore the consequences to the administration when juniors supersede seniors although the seniors are as much or even more competent than the juniors," the Court stated. "When reservations are kept in promotion, the inevitable consequence is the phenomenon of juniors, however low in the seniority list, stealing a march over their seniors to the promotional post. When further reservations are kept at every promotional level, the juniors not only steal march over their seniors in the same grade but also over their superiors at more than one higher level. This has been witnessed and is being witnessed frequently wherever reservations are kept in promotions. It is naive to expect that in such circumstances those who are superseded, (and they are many) can work with equanimity and with the same devotion to and interest in work as they did before. Men are not saints. The inevitable result, in all fields of administration, of this phenomenon is the natural resentment, heart-burning, frustration, lack of interest in work and indifference to the duties, disrespect to the superiors, dishonour of the authority and an atmosphere of constant bickerings and hostility in the administration. When, further, the erstwhile subordinate becomes the present superior, the vitiation of the atmosphere has only to be imagined. This has admittedly a deleterious effect on the entire administration."

The damage is twice over. "It is not only the efficiency of those who are thus superseded which deteriorates on account of such promotions," the Court continued, "but those superseding have also no incentive to put in their best in work. Since they know that in any case they would be promoted in their reserved quota, they have no motivation to work hard. Being assured of the promotion from the beginning, their attitude towards their duties and their colleagues and superiors is also coloured by this complex. On that account also the efficiency of administration is jeopardised."

Moreover, efficiency is promoted or marred not just by the effect of a measure on an individual – whether he feels the system is recognizing the effort he is putting in, whether he feels that it is just as between him and his colleagues, whether beneficiaries of preferential consideration have sufficient incentive thereafter to put in their best – but also by the effect it has on the overall atmosphere in which the government service functions. "The expression 'consistently with the maintenance of efficiency of administration' used in Article 335 is

related not only to the qualifications of those who are appointed, *it covers all consequences to the efficiency of administration on account of such appointments*," the Court emphasized. "They would necessarily include the demoralisation of those already in employment who would be adversely affected by such appointments, and its effect on the efficiency of administration. The only reward that a loyal, sincere and hard-working employee expects and looks forward to in his service career is promotion. If that itself is denied to him for no deficiency on his part, it places a frustrating damper on his zeal to work and reduces him to a nervous wreck. There cannot be a more damaging effect on the administration than that caused by an unreasonable obstruction in the advancement of the career of those who run the administration. The reservations in promotions are, therefore, inconsistent with the efficiency of administration and are impermissible under the Constitution."

And there was another manifest reason: the Constitution allows discrimination as between different classes; once the candidates enter a service, they become part of one stream, and "the past injustice stands removed." Therefore, to discriminate between them after that point of entry is unconstitutional.

Finally, the facility that has been permitted by the Constitution – of reservations – is for *groups*. But promotion is given to an *individual* – "It is one against the other." Justice Kuldeep Singh points out in *Indra Sawhney* that Article 16(4) enables the Executive to decree reservations for a *class*. But when posts in successive steps of the hierarchy are reserved, the benefit accrues, not to a class but to individuals.

The compromise

But then came the compromise, and it was threefold. First, as we noted, the Court said that the restriction – that there must not be any reservations in promotions – could be circumvented through direct recruitment. This itself blunted much of what the Court had said in such strong words. Not only that, the Court said that for this purpose the Government could grant concessions and relaxations in the prescribed standards, adding the caveat of no effect, that while doing so the Government should ensure that the efficiency of administration is not compromised.

The ambivalence and “balancing” can be seen by perusing Justice Sawant’s formulations. On the one hand, he declared that Article 16(4) is intended to redistribute power; that power resides in the upper reaches of administration; that, therefore, adequate representation means that the backwards must be adequately represented at all levels and not just numerically in the service as a whole. But on the other hand, he penned some of the most uncompromising passages on why there should be no reservations in promotions as these would mar efficiency of administration. On the one hand, he stressed that, as sharing power is the objective, the backwards should get adequate representation in the higher reaches of administration also. But, on the other, he warned that such representation “cannot be achieved overnight or in one generation.” Moreover, he said, “such representation cannot be secured at the cost of the efficiency of the administration which is an equally paramount consideration while keeping reservations.” Accordingly, he suggested that persons be recruited directly at higher levels, and that there be reservations in such direct recruitment; that persons from backward castes be given such special assistance as they may require to qualify for recruitment to those posts; that there be persons from these backward castes in the selection committees, and so on.

But many of these measures will in practice injure the efficiency of administration in exactly the same way and to the same extent as reservations in promotions.

Second, the Court specified that its decision on this aspect would operate only prospectively. Third, and most consequential, it said that wherever reservations are already provided in the matter of promotion – be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of ‘State’ in Article 12 – *such reservations shall continue in operation for a period of five years from this day*. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant Rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of ‘backward class of citizens’ in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so.¹

¹On the foregoing, *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, paras 301-02, 308-10, 547-48, 543-48, 602, 623, 635, 828-29, 859.

That opening was enough for the political class. The Court may have said that the Executive or legislature could amend rules, etc. to provide for direct recruitment. The two, in fact, amended the Constitution itself so as to reduce its ruling to a nullity!

*Do the reasons evaporate because
the Constitution has been amended?*

Now, the point to remember is the following: the reasons that the Court gave for holding reservations in promotions to be imprudent and worse would continue to be just as valid five years after 1992 as they were at the time. But all of them were forgotten, they were perforce forgotten once the Constitution was amended during those five years!

- ❑ Would reservations in promotions be a less "serious and unacceptable inroad into the rule of equality of opportunity"?
- ❑ Would they cease to "mean creation of a permanent separate category"?
- ❑ Would they suddenly cease to "generate a feeling of despondence and 'heart-burning' among open competition members"?
- ❑ Would they no longer "cause frustration and passionate prejudice, hostility and ill will not only in the mind of the overlooked candidate, but also in the minds of the generality of employees"?
- ❑ Would the fact that "such discrimination is unfair and it causes dissatisfaction, indiscipline and inefficiency" disappear?
- ❑ Would it be less "foolhardy to ignore the consequences to the administration when juniors supersede seniors although the seniors are as much or even more competent than the juniors"?
- ❑ Will men suddenly become saints and it no longer be the case that the inevitable result "in all fields of administration, of this phenomenon is the natural resentment, heart-burning, frustration, lack of interest in work and indifference to the duties, disrespect to the superiors, dishonour of the authority and an atmosphere of constant bickerings and hostility in the administration"?
- ❑ Will those who are now certain that they *will* be promoted just because of their birth suddenly get "incentive to put in their best in work" from some other quarter?

- Do the facts that employees form one stream, and that there can be no discrimination within one stream, become invalid?

The wages of compromise

There is an all-important lesson in this sequence. That the Executive and legislature will use the window of five years to overturn the judgment could have been anticipated. Indeed, there could have been no doubt about that at all. Yet, the Court went in for a compromise. When I first read the relevant passages in *Indra Sawhney*, I was reminded of the disastrous compromise that Justice Krishna Iyer had articulated in 1975. Mrs. Indira Gandhi had been held guilty of corrupt electoral practices by the Allahabad High Court. The judgment entailed her disqualification from the Lok Sabha. The Judge, Justice Sinha, had given her a stay in case she wanted to file an appeal. She filed the appeal in the Supreme Court. It came before Justice Krishna Iyer as Vacation Judge. At the very beginning he said, *"the proceedings in the Halls of Justice must be informed, to some extent, by the great verity that the broad sweep of human history is guided by sociological forces beyond the ken of the noisy hour or the quirk of legal nicety. Life is larger than Law,"* thus indicating the considerations that would weigh with him. The Allahabad verdict would entail unseating a Prime Minister. Precedents had been cited by counsel from both sides *"and courts look for light, inter alia, from practice and precedent, without however being hidebound mechanically by the past alone. After all, judicial power is dynamic, forward-looking and socially lucent and aware."* "Suffice it to say," he said, *"that the power of the Court must rise to the occasion, if justice, in its larger connotation, is the goal – and it is."* We should pay heed to the peroration, as these are the very premises – about law, about the proper role of the judiciary – that lead to the excesses that are the main subject matter of this essay.

He was aware of the dilemma that confronts courts, he indicated, and there was a way out.

"This brings to the fore an activist interrogation about the cognisability of such considerations by a court," he said, adverting to the considerations that counsel had urged. "Do the judicial process and its traditional methodology sometimes make the Judicature look archaic, with eyes open on law and closed on society, forgetting

the integral *yoga* of law and society? If national crises and democratic considerations, and not mere 'balance of convenience and interests of justice', were to be major inputs in the Judge's exercise of discretion, systemic changes and shifts in judicial attitudes may perhaps be needed" – something he had all along presumed is his task to blaze into our jurisprudence. But there was a handicap, he indicated: "Sitting in time-honoured forensic surroundings *I am constrained to judge the issues before me by the canons sanctified by the usage of this Court.*"

"At first flush," he said, "I was disposed to prolong the 'absolute stay' granted by the High Court." "The nature of the invalidatory grounds upheld by the High Court, I agree, does not involve the petitioner [Mrs. Indira Gandhi] in any of the graver electoral vices set out in Section 123 of the [Representation of Peoples] Act." But there are two problems, he indicated. One, "The High Court's finding, until upset, holds good, however weak it may ultimately prove." Second, "Draconian laws do not cease to be law in court..."

For these and other considerations, he gave a conditional stay – Mrs. Gandhi would continue as member of Parliament, she would continue to have the right to participate in the proceedings, but she would not have the right to vote. Of course, Justice Krishna Iyer was quick to note that the latter condition was "currently academic" only as Parliament was not in session.

And he indicated the way out. "Draconian laws do not cease to be law in court...", explaining the constraint under which he was functioning, as we saw, but he had added, "*but must alert a wakeful and quick-acting Legislature.*"¹

That "dynamic, forward-looking and socially lucent and aware" advice "guided" as it was "by sociological forces beyond the ken of the noisy hour or the quirk of legal nicety" proved just right! His compromise judgment did just what he had said it should: "alert a wakeful and quick-acting Legislature."

The "wakeful and quick-acting Legislature" passed the 39th Amendment of the Constitution – without discussion, all in one day. The state legislatures proved equally "wakeful and quick-acting" –

¹ *Indira Nehru Gandhi v. Raj Narain*, (1975) 2 SCC 159, in particular, at 160, 161, 163, 164, 170; paras 1, 3, 4, 8, 10, 32.

they ratified the Amendment within a day. So that when the Court reconvened to hear the case, it had to consider it in the light of the new provisions!

They were such that, as a prophylactic, we should have children memorise them in schools:

- ❑ The election of a person who at the time of the election or thereafter is appointed Prime Minister shall not be called in question "except before such authority... or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned."
- ❑ "The validity of any such law... and the decision of any authority or body under such law shall not be called in question in any court."
- ❑ "Where any person is appointed as Prime Minister... while an election petition... in respect of his election to either House of Parliament or, as the case may be, to the House of the People is pending, such election petition shall abate upon such person being appointed as Prime Minister..."
- ❑ The diabolic and conclusive clause (4): "No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person ... and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect."
- ❑ "Any appeal or cross appeal against any such order of any court as is referred to in clause (4) [the preceding sub-para] pending

immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4)."

The country had to bear the cost of the progressive guidance! And so had jurisprudence, and indeed the Supreme Court itself: for it had to go in for even greater convolutions in the main case, *Indira Nehru Gandhi v. Raj Narain*.¹

As we shall see on more than one occasion, the Court is too prone to being considerate, to temporize, to postpone the issue. We have seen how its explicit ruling that reservations must not exceed 50 per cent was overturned in exactly the same way by exactly the same agency, "wakeful and quick-acting" legislatures. The Tamil Nadu legislature and then Parliament passed the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of appointments or posts in the Services under the State) Act, 1993, and put it in the Ninth Schedule – that is, beyond the reach of courts.

The constitutionality of this Act was challenged. The writ was referred to a seven judge Bench – in 1994. For *eleven years*, the Court has been passing an interim order every year directing the state Government to create a few extra seats in its medical and engineering colleges so that candidates from non-reservation castes, who would have got in on merit but have been denied admission because the seats have been set aside for the reservationists, do not suffer. The basic issue has not been faced.² What is the inference that the political class draws from such indefinite deferment? That it can ram its convenience, and the Court will look the other way.

That is an all-important lesson: temporizing will not do; the merest nod – even the customary way the polite liberal begins his response, "There is much in what you say... May I just put the other side of the picture for a minute?," will be enough for the political class, as it is indeed for the progressive judge who follows. That class and that sort of judge will run with it, insisting that the court itself was not certain

¹(1975) Supp. SCC 1.

²C.f., J. Venkatesan, "Apex Court extends order on extra seats in medicine, engineering," *The Hindu*, 8 May, 2004.

about what it was holding, that it acknowledged, "There is much in what you say," that it was itself conscious that it was presenting just one side of the matter... The country cannot be drawn out of the abyss through convoluted compromises. The axe has to be put at the root.

The Court went in for the compromise again when it came to the operational part of its pronouncements on reservations in promotions.

The "wakeful and quick-acting Legislature" amended the Constitution, and nullified the Court's ruling on the matter.

The Constitution amended, the Court itself has been repeating everything that it had said was ruinous. Indeed, as is the wont of progressives, each succeeding judge has felt compelled to embellish what has been stated in the preceding judgment, he has enlarged the "rights" step by disastrous step.

A single illustration will have to suffice.

The progressive march

In *Ashok Kumar Gupta v. State of U.P.*, the Supreme Court holds:

- ❑ Article 16(4) aims at providing "adequate representation" to SC/ST/OBCs in government services. Unless these groups get reservations in the higher posts, they will not be "adequately represented".
- ❑ When a person gets recruited to a service, he assumes all the duties that go with the service, and he acquires a right to all the incidents of that service. Getting to the higher positions is one of the rights he acquires by virtue of joining that service. In a word, promotion is a facet of recruitment. "Right to promotion *is a method of recruitment* from one cadre to another higher cadre or class or category or grade of posts or classes of posts or offices, as the case may be," the Supreme Court says. "Reservation in promotion has been evolved as a facet of equality where the appropriate Government is of the opinion that the Dalits and Tribes are not adequately represented *in the class or classes of posts in diverse cadres, grade, category of posts or classes of posts.*"

Notice the elongation. The Constitution speaks of adequate representation in the service. By these words, the Court reads into the

Constitution the mandate for adequate representation in each of the various "grades, categories of posts or classes of posts." The Court continues, "The discrimination, therefore, by operation of protective discrimination and distributive justice is inherent in the principle of reservation and equality too by way of promotion but the same was evolved as a part of social and economic justice assured in the Preamble and Articles 38, 46, 14, 16(1), 16(4) and 16(4A) of the Constitution. The *right to equality, dignity of person and equality of status and of opportunity* are fundamental rights to bring the Dalits and the Tribes in the Mainstream of the national life."

- ❑ Next, "Every citizen or group of people has a right to share in the governance of the State," the Supreme Court holds. "The Dalits and Tribes equally being citizens have a right to share in the governance of the State... The right to seek equality of opportunity to an office or a post under the State is a guaranteed fundamental right to all citizens under Article 16(1), the specie of Article 14, the genus."

Notice again the elongation and interpolation. What is a prohibition – that the State shall not discriminate against any one on the ground of sex, creed, caste, etc. – becomes a right to a service. What is a right to have an equal opportunity to enter a service becomes a right to actually enter the service. Next, the right to have an equal opportunity to be in a *service* becomes the right to be at *every level in the hierarchy*, indeed in every *post*.

Nor are the judges in any doubt that to elongate and interpolate in this way is not just their right, it is their duty. For, they say, "In *Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Ors.*, [1991] Supp. 1 SCC 600 at 737 para 271 it was held that law is a social engineering to remove the existing imbalance and to further the progress, serving the needs of the Socialist Democratic Bharat under the Rule of Law. The prevailing social conditions and actualities of life are to be taken into account in adjudging whether or not the impugned legislation would subserve the purpose of the society."

- ❑ Social justice is a Fundamental Right. Economic empowerment is a Fundamental Right. Moreover, the disadvantaged have a guaranteed right to equality of status and dignity. None of

these can be secured until the disadvantaged get into the higher posts.

- ❑ Not just that, unless the SC/ST/OBCs get hold of the higher posts, the equality would be there only on paper, only in law, not in fact.

The Court's pronouncements on this matter take us to the next brick by which the structure is constructed. The Court says,

It is obvious that equality in law precludes discrimination of any kind whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes and equilibrium between different situations. To give adequate representation to the Dalits and Tribes *in all posts or classes of posts or services*, a reality and truism, facilities and opportunities, as enjoined in Article 38, are required to be provided to them to achieve the equality of representation in real content.¹

Tautology becomes reason!

- ❑ All must have equal opportunity.
- ❑ Clearly, if the SCs/STs/OBCs are not found sitting in the higher posts, the equality of opportunity that was afforded was nothing but a sham.

And when would we know that the equality of opportunity that the system made available is real? Only when the SCs/STs/OBCs are found sitting in the higher posts. And, given the perversities inherent in the criteria that have been devised to adjudge merit, given too the perversities that are congenital in those who are to adjudge merit, this can only happen if others are excluded from these posts, and the posts are reserved for the SCs/STs/OBCs. Q.E.D.

¹For the preceding, *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201; in particular, paras 23, 25, 26, 42, 46.

From equality of opportunity
to that of outcomes,
From absence of disabilities
to presence of abilities,
From providing assistance
to imposing handicaps

The Constitution is clear as can be: it prohibits discrimination on grounds of sex, caste, race, etc.; it guarantees every citizen equality before law; it guarantees every citizen equal opportunity to access public employment.

But “whether there is equality of opportunity,” Justice K.K. Mathew observed in *N.M. Thomas*, “can be gauged only by the equality attained in the result. Formally equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair. Equality of result is the test of equality of opportunity.”¹ Reservations are illustrative of the measures that the State “must take” to “wipe out” the distinction between “formal or legal equality” and “equality in fact”, Justice O. Chinnappa Reddy says in *Akhil Bharatiya Soshit Karamchhari Sangh*, thus reading his own goal into the Constitution. “Equality of opportunity must be such as to yield ‘Equality of results’ and not that which simply enables people, socially and economically better placed, to win against the less fortunate, when the competition is itself otherwise equitable.”²

Notice two features. The objective the Judge sets out is to “wipe out” the distinction between equality of opportunity – which is what

¹*State of Kerala v. N.M. Thomas*, 1976 2 SCC 310, at 346, para 75.

²*Akhil Bharatiya Soshit Karamchhari Sangh v. Union of India*, (1981) 2 SCR 185; AIR (1981) SC 298. He quotes this observation himself in *Vasanth Kumar*, *op. cit.*, at 1527, para 76.

the Constitution mentions – and equality of results – which is what progressive judges have read into it. *Wipe out*? Which society has ever been able to *wipe out* that distinction? Once an objective is defined in this manner, does it not become the ground for perpetuating measures like reservations indefinitely? Is it not the case, in fact, that the cry of wiping out distinctions has been the principal device by which other values – such as liberty – have been crushed? Progressives must surely be the first to know that – having spent lifetimes internalizing histories of the Soviet Union and East European countries.

Second, notice that, while progressive judges justify their assertions in this context on the ground that unless equality is brought about in *results*, a measure like reservations “simply enables people, socially and economically better placed, to win against the less fortunate,” many of them vehemently reject the proposition that, within SCs/STs/OBCs, the “creamy layer” shall “win against the less fortunate”, and therefore it must be hived off.

What was a provision to ensure that no individual is barred or discriminated against on grounds of caste, etc., has thus been converted into a directive to ensure that he gets into the service. There has been another “creative application”, so to say, by which the fundamental guarantee of equality to each individual has been chiselled further. The judges have maintained that Articles 15(4) and 16(4) speak of helping “classes” – that is, they aim at eliminating the backwardness of *groups*. Hence, the right of an individual to equal opportunity cannot be allowed to stand in the way of the right of the socially and educationally backward group to have preferential access.

This, of course, has been built up storey by storey in each successive judgment. By the time we come to *Post-Graduate Institute of Medical Education and Research*, the Supreme Court is dismissing the concern for the individual’s right to equal opportunity in this context as “absurd”, and declaring that it “cannot countenance” even the suggestion that the individual’s right should be borne in mind when measures have been instituted for a disadvantaged group’s advancement. It reiterates what it has said in *Dr. Pradeep Jain v. Union of India*.¹ “Now the concept of equality under the Constitution

¹(1984) 3 SCC 654.

is a dynamic concept. It takes within its sweep every process of equalization and protective discrimination. Equality must not remain mere idle incantation but it must become a living reality for the large masses of people. In a hierarchical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggest the progressive measures to eliminate group disabilities and promote collective equality are antagonistic to equality on the ground that every individual is entitled to equality of opportunity based purely on merit judged by the marks obtained by him. We cannot countenance such a suggestion, for to do so would make the equality clause sterile and perpetuate existing inequalities."¹

Next comes the plea of practicality. In education, while adhering to merit, while admitting students on the basis of a test that adjudges their merit across the country as a whole are ideals, they cannot be secured in practice, we learn in other judgments. Tests of qualifications across states and the country may provide equality of opportunity, but they will ensure inequality in results, and that will be proof that opportunities are in fact not equal. Hence, says the Supreme Court, "...There can be no doubt that the policy of ensuring admissions to the MBBS course on all-India basis is a highly desirable policy, based as it is on the postulate that India is one nation and every citizen of India is entitled to have equal opportunity for education and advancement, but it is an ideal to be aimed at and it may not be realistically possible, in the present circumstances, to adopt it, for it cannot produce real equality of opportunity unless there is complete absence of disparities and inequalities – a situation which simply does not exist in the country today."

Notice again, the height at which the bar is being placed: "unless there is *complete absence of disparities and inequalities*."

"There are massive social and economic disparities and inequalities," a "yawning gap" the Court says, citing earlier rulings, and it lists them – between states; between regions within a state; between citizens and citizens within one region in one state; between rich and poor. In each of these categories, the ones who are not well-placed will just not be able to compete with those who are better off.²

¹ *Post-Graduate Institute of Medical Education and Research v. K.L. Narasimban*, (1997) 6 SCC 283, at 305-06, para 22.

² *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146, at 170, para 49.

We can be certain that the situation that the Supreme Court envisages in such judgments – “complete absence of disparities and inequalities”; the elimination of differences between state and state, between regions within each state, between citizen and citizen within each region in each state, between well-to-do and poor – will not come to pass in several lifetimes.

In governmental services, “real equality”, equality of results will not be the case unless the SC/ST/OBCs occupy the higher posts, the progressive judges say – for that is where power, status, dignity reside. To lift them into those higher levels is the duty of the State, and reservation of these posts for the SC/ST/OBCs is the necessary means. But even that is not enough, says the Supreme Court. In *Dr. Pradeep Jain*, the Court says, “Equality of opportunity is not simply a matter of legal equality. *Its existence depends not merely on the absence of disabilities but on the presence of abilities.*”

Even that is not enough, the Court proceeds to say: “...It is, therefore, necessary to take into account *de facto* inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons or *inflicting handicaps on those more advantageously placed*, in order to bring about real equality.”

The scales are by now completely overturned: “Such affirmative action though apparently discriminatory is calculated to produce equality on a broader basis by eliminating *de facto* inequalities and placing the weaker sections or the community on footing of equality with the stronger and more powerful sections so that each member of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence.”

And then occurs another feature of such judgments. One of the judges who is in this Bench had expressed himself on the matter in an earlier case – the position he staked out then is repeated now, and becomes thereby the verdict of the Court. In *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College*, the Court said, “*De jure* equality must ultimately find its *raison d’etre* in *de facto* equality. The State must, therefore, resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equal in specified areas. It is

necessary to take into account *de facto* inequalities which exist in the society and to take affirmative action by way of giving preference and reservation to the socially and economically disadvantaged persons or *inflicting handicaps on those more advantageously placed*, in order to bring about real equality." The Judge maintained that "Such affirmative action though apparently discriminatory is calculated to produce equality on a broader basis by eliminating *de facto* inequalities..." and is therefore not just justified, but is in fact mandatory.¹

What is in one case the formulation of one judge, becomes in a subsequent case the opinion of the whole Bench – of which that one judge is a member! Notice, how the judges deliberately confound equality of *opportunity*, the right that has been guaranteed in the Constitution, with equality of *outcomes*. Notice what they encompass under what they call "affirmative action" – in their reckoning, this is not limited to steps that would enable those who are not well equipped to become better able to compete with others; it necessarily entails weighing the better equipped down with handicaps. The Court proceeds to intermingle these notions, and twice reproduces words to the same effect – unequals have to be treated unequally, etc., and decrees, "It would, therefore, be necessary to take into account *de facto* inequality in which exists the society and to take affirmative action *by giving preferences and making reservation in promotions* in favour of the Dalits and Tribes or by '*inflicting handicaps on those more advantageously placed*', in order to bring about equality. Such affirmative action, though apparently discriminatory, is calculated to produce equality on a broader basis by eliminating *de facto* inequality and placing Dalits and Tribes on the footing of equality with non-tribal employees so as to enable them to enjoy equal opportunity and to unfold their full potentiality..."

Such "protective discrimination" is what the Court says is "envisaged" in Articles 16(4) and 16(4-A). As equality in results cannot be brought about without reservations in promotions, such reservations are just carrying out the command of the Constitution.²

¹Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College, (1990) 3 SCC 130, at 138, para 8.

²Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC 201, at 227-31, paras 28-30.

Three questions:

- ❑ Is it that the Supreme Court which is always so anxious that we go by empirical evidence, that we desist from conjectures, is it that that Court has suddenly come upon some empirical evidence about the effects on efficiency of administration of reservations in promotions to so completely repudiate what it had so emphatically stated in *Indra Sawhney*?
- ❑ In the alternate, has the fact that the political class has inserted a new clause in the Constitution had such a powerful intellectual influence on the Court as to make it repudiate what eight out of eight Judges had said so unambiguously in that landmark case?
- ❑ In the "alternate to the alternate", is this assessment – this empirical assessment – of the effects of reservations in promotion just the subjective assertion of one progressive Judge? I say "subjective assertion", for the Judge does not adduce any evidence to support what he is asserting.

From "less than 50 per cent" to "Even 100 per cent"

Indeed, proceeding along this route, the Supreme Court comes to hold that, even if there is just one single post at the top, and reserving it would amount to 100% reservation; even then, confining it, by rotation, or through the Roster, to Scheduled Castes and Tribes or the Backward Classes will be fully in accord with the Constitution. Indeed, reserving that single post for SCs/STs "is consistent with equality of opportunity on par with others." How excluding everyone else from that single post "is consistent with equality of opportunity on par with others" is, of course, not explained!¹

These judgments had gone so far overboard that the Court had eventually to reverse them. When just one post is available, the Court has since held, to reserve it is to completely exclude the entire population that has not been listed in Schedules. This violates the fundamental right to equality, and is therefore not permissible.²

¹See, for instance, *Union of India v. Madhav*, (1997) 2 SCC 332; *Union of India v. Brij Lal Thakur*, (1997) 4 SCC 278; *Post Graduate Institute of Medical Education and Research, Chandigarh v. K.L. Narasimhan*, (1997) 6 SCC 283.

²*Post Graduate Institute of Medical Education and Research, Chandigarh v. Faculty Association*, (1998) 4 SCC 1.

That things had to go so far before the Court would call a halt, itself shows how difficult our polity – and we must include the judiciary in that – now finds it to draw a line.

Creative reading!

But the judgments in which reservation of a post when that is the only one available illustrate another feature of activism. In delivering those judgments the judges had declared that they were following a line of precedents. They had cited the Constitution Bench's judgment in *Arati Ray Choudhry v. Union of India*¹ and other cases, and maintained that in these cases the Supreme Court had held that reservation of single posts with the help of the Roster System was entirely constitutional. The Constitution Bench of five judges which heard the appeal set out what had actually been held in these cases, and was constrained to point out that the judgments the judges had cited had *not* held that reservation in single posts was constitutional! It cited case after case which, it was compelled to note, the judges had "not properly appreciated". Their inference about what the Court had held in those cases rested, it was compelled to note, on "erroneous assumption" and "on account of a misreading."²

But when such constructions are put on "equality", will those who do not happen to have been born to disadvantaged parents not become victims of reverse discrimination? Would that not violate the very notion – the Basic Structure of the Constitution – in the name of which "equality" is pushed to such lengths? The judges brush that aside. As is usual in such matters, Justice Krishna Iyer leads the way. In *Maharao Sahib Shri Bhim Singhji v. Union of India*, he declaims: "The question of basic structure being breached cannot arise when we examine the *vires* of an ordinary legislation as distinguished from a constitutional amendment. *Kesavananda Bharati cannot be the last refuge of the proprietariat* when benign legislation takes away their 'excess' for societal weal. Nor, indeed, can every breach of equality spell disaster as a lethal violation of the basic structure. Peripheral inequality is inevitable when large-scale equalisation processes are put into action..." "Every large cause claims some martyr, as

¹1974 (1) SCC 87.

²*Ibid*, in particular paras 25-26, 32, 33-35.

sociologists will know," the Judge proclaims. "Therefore, what is a betrayal of the basic feature is *not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice.*"

Hence, anyone questioning a measure must establish not just that it is "not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice," and in addition that he is not using *Kesavananda Bharati* as "the last refuge of the Proprietariat."

The judgment in *Kesvananda Bharti* now becomes a "ghost". The activist Judge proceeds, "If a legislation does go that far it shakes the democratic foundation and must suffer the death penalty. But to permit the *Bharati* ghost to haunt the corridors of the court brandishing fatal writs for every feature of inequality is judicial paralysation of parliamentary function."

You must, therefore, establish that you are not invoking ghosts!

"Nor can the constitutional fascination for the basic structure doctrine be made a trojan horse to penetrate the entire legislative camp fighting for a new social order and to overpower the battle for abolition of basic poverty by the 'basic structure' missile. Which is more basic? Eradication of die-hard, deadly and pervasive penury degrading all human rights or upholding of the legal luxury of perfect symmetry and absolute equality attractively presented to preserve the *status quo ante*? To use the Constitution to defeat the Constitution cannot find favour with the judiciary! I have no doubt that the strategy of using the missile of 'equality' to preserve die-hard, dreadful societal inequality is a stratagem which must be given short shrift by this Court."¹

The net result of such "reasoning" is that anyone who may be raising perfectly valid questions in law is now put to first prove that he is not using Trojan horses to fire missiles for sabotaging efforts aimed at bringing succour to the starving millions.

But the Judge hath spoken, all disputation is ended. And the "reasoning" becomes handy scripture in subsequent judgments.²

¹*Bhim Singhji v. Union of India*, (1981) 1 SCC 166, at 186, para 20.

²See, for instance, *Saurabh Chaudri v. Union of India*, *op. cit.*, at 179, para 85, in which it is invoked.

Conspiracy! Conspiracy!

“Merit mongers”

Justice V.R. Krishna Iyer who we saw declare in *N.M. Thomas*, “You can’t throw to the winds considerations of administrative capability and grind the wheels of Government to a halt in the name of ‘*harijan* welfare’. The administration runs for good government, not to give jobs to *harijans*....,” in *Akhil Bharatiya Soshit Karamchari* pooh-poohs the consideration of efficiency. In this case – the judgment on which became quite the banner of progressive jurisprudence at the time – Justice Krishna Iyer disposes of the apprehensions about inefficiency by arguing, as he did in *N.M. Thomas*, that the posts in question are clerical posts, and the way duties are discharged in them just cannot have that much impact on the efficiency of governance as a whole. He notes too that in *Rangachari*, the Supreme Court has already accepted reservation in higher posts: “If, in selecting top officers you may reserve posts for SC/ST with lesser merit,” he holds, “how can you rationally argue that for the posts of peons or lower division clerks reservation will spell calamity? The part that efficiency plays is far more in the case of higher posts than in the appointments to the lower posts.”

The Railways had decreed that there shall be reservations not only at the entrance but also in promotions; that there shall be reservations in promotions in both non-selection and selection posts; that, not 50 per cent, but $66\frac{2}{3}$ per cent of all seats at the entrance as well as in promotions shall be reserved; that the Scheduled Caste and Scheduled Tribe employees shall be deemed to have secured an assessment one grade higher than the one that their superiors in service have assigned them; that reserved vacancies in the higher posts not filled this year shall be carried over for three years; and so on. The very Judge who has earlier proclaimed that efficiency of administration must be a paramount consideration while framing

ameliorative measures like reservations now dismisses the apprehension with invective.

"Trite arguments about efficiency and inefficiency are a trifle phoney," Justice Krishna Iyer declares in a passage that will become a favourite of many a progressive successor judge, "because, after all, at the higher levels the *barijan/girijan* appointees are a microscopic percentage and, even in the case of Classes III and II posts, they are negligible. The preponderant majority coming from the unreserved communities are presumably efficient and the dilution of efficiency caused by the minimal induction of a small percentage of 'reserved' candidates cannot affect the overall administrative efficiency significantly. Indeed, it will be gross exaggeration to visualise a collapse of the Administration because 5 to 10 per cent of the total number of officials in the various classes happen to be substandard. Moreover, care has been taken to give in-service training and coaching to correct the deficiency."¹

Notice, in *N.M. Thomas*, reservations were approved on the ground that the posts in question were just clerical posts. In *Soshit Karamchhari Sangh*, they are being approved on the ground that they are but a microscopic fraction of the total number of posts. But the "principle" that gets carried forward, so to say, into subsequent judgments is that in these cases, as in *Rangachari*, the Supreme Court has approved reservations in promotions!

In all services.

To all levels.

And at least fifty per cent reservations of posts at all levels in all services.

Have standards been going down all round? Does this not suggest that we should seize every opportunity to arrest this trend? Or does it suggest that, as standards are going down all round, why should we be particular about the sphere before us? Here is the perspective that Justice Krishna Iyer advances: yes, standards may have been falling; but the world has been going forward; only those are mongering on about merit whose personal interests are set back by the reservations policy.

¹*Akhal Bharatiya Soshit Karamchhari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 297, para 93.

"It is fashionable to say," he says, "and there is, perhaps, some truth in it," he allows as a good debater should, "that from generation to generation there is a deterioration in efficiency in all walks of life from politics to pedagogy to officialdom and other professions." But of what account is that? After all, "Nevertheless, the world has been going forward and only parties whose personal interest is affected forecast a doom on account of progressive deficiency in efficiency." "We are not impressed with the misfortune predicted about governmental personnel being manned by morons" – who had said that Government was coming to be manned by "morons"? – "merely because a sprinkling of *haryans/girijans* happen to find their way into the services" – the order in question has decreed that 66⅔ per cent of vacancies will be reserved, to the Judge 66⅔ per cent are just "a sprinkling". That is followed by compassion: "Their apathy and backwardness are such that in spite of these favourable provisions, the unfortunates have neither the awareness nor qualified members to take their rightful place in the administration of the country." And then, "The malady of modern India lies elsewhere, and the merit-mongers are greater risks in many respects than the naive tribals and the slightly better off low castes". Was Pandit Nehru a "merit-monger"? Most certainly: recall that letter he wrote to the Chief Ministers in 1961! Were the framers of the Constitution "merit-mongers"? Most certainly: because they incorporated Article 335 in the Constitution!

"Nor does the specious plea that because a few *haryans* are better off, therefore, the bulk at the bottom deserves no jack-up provisions merit scrutiny," Justice Krishna Iyer says, the very Krishna Iyer who has dilated at length on how the better-off among the dispossessed inflict double injury by hogging benefits of reservations. "A swallow does not make a summer." Then, as we noted, "Maybe," he says, "the State may, when social conditions warrant, justifiably restrict *haryan* benefits to the *haryans* among the *haryans* and forbid the higher *haryans* from robbing the lowlier brethren."¹ A much favoured device – pass the problem to someone else to tackle sometime in the indefinite future.

Justice Krishna Iyer presses the case. In fact, he says, the Scheduled

¹*Ibid*, at 298, para 94.

Caste employees are more suitable for higher posts as they have experienced first hand the privation that has to be eliminated; that experience is a much more reliable guide of suitability than the farce of examinations and assessments. Remember, the posts in question are in the Railways, the core function is to run trains. At the higher levels, the core function is to run a huge organization, one of the largest in the world. But empathy it seems is what is needed!

"The fundamental question arises as to what is 'merit' and 'suitability'," the Judge says. "Elitists whose sympathies with the masses have dried up are, from the standards of the Indian people, least *suitable* to run Government and least *meritorious* to handle State business, if we envision a Service State in which the millions are the consumers. A sensitized heart and a vibrant head, tuned to the tears of the people, will speedily quicken the developmental needs of the country, including its rural stretches and slum squalor. Sincere dedication and intellectual integrity – these are some of the major components of 'merit' and 'suitability' – not degrees from Oxford or Cambridge, Harvard or Stanford or simian, though Indian, institutions" – and the Judge must have, we must assume, some empirical information to establish that those inducted through reservations have a greater degree of "sincere dedication and intellectual integrity."

"Unfortunately, the very orientation of our selection process is distorted and those like the candidates from the SC & ST who, from their birth, have had a traumatic understanding of the conditions of agrestic India have, in one sense, more capability than those who have lived under affluent circumstances and are callous to the human lot of the sorrowing masses," Justice Krishna Iyer concludes. We select persons through examinations, the Judge laments, but the system of examinations is flawed: "Moreover, our examination system makes memory the master of '*merit*' and banishes creativity into exile." Again, there must be some empirical information that has led the Judge to conclude that there is more creativity among those who come through reservations.

And then a typical deferment to the "brooding presence of the future": "We need not enter these areas where a fundamental transformation and a radical reorientation even in the assessment of

the qualities needed by the personnel in the Administration and the socialist values to be possessed by the echelons in office is a consummation devoutly to be wished. This may have to be subjected to a national debate."

A much favoured device, that one: when the fact just cannot be denied, or the assertion cannot be substantiated, suggest a national debate in the future! And cast the shadow of doubt over the results of such system as we have till that debate is concluded!

But the Judge is far from done. Excluding someone through these examinations, Justice Krishna Iyer declaims, is no different from the British excluding Gandhiji, Nehru, JP, Ambedkar: "The colonial hangover still clings to our selection processes with superstitious tenacity and narrower concepts of efficiency and merit are readily evolved to push out Gandhis and JPs, Ambedkars and Nehrus, to mention but a few who knew the heartbeats of the people."

Is it that these personages were excluded by the British through some examinations, or that these persons decided not to sit for the exams and instead do something more than join government departments?

The Judge couldn't be bothered to pause and ask. He now sees opposition to his assertions as nothing but the age-old attempt of establishments to scotch every new idea:

I divagate and make these observations only to debunk the exaggerated argument about *barijans* and *girijans* being substandard. We may put aside this angle of vision and approach the problem traditionally because *every new idea* has resistance to encounter before acceptance, every original thought has been branded a heresy.¹

The martyr standing up to vested interests and orthodoxy!

But by the orders that have been put in place – two-thirds of the vacancies to be reserved; unfilled vacancies to be carried over for three years; reservations in promotions also – it is entirely likely that in some years, 100 per cent of the openings shall be reserved, that general category employees shall be completely shut out; that *all* positions shall be filled on the basis of birth, and *none* on the basis of merit. Even if that were to happen, so what?, asks the Judge:

¹*Ibid*, at 299, para 97.

It is true that Shri Venugopal, counsel for some of the petitioners tried to demonstrate that on account of reservation percentages coupled with the carry forward rule it is perfectly within the realm of possibility that in some years a monopoly may be conferred on the SC & ST candidates for certain categories or classes of posts. The mystic "maybes" do not scare us. The actual "must bes" will alert us. The Constitution deals with social realities, not speculative possibilities.¹

Recall those verdicts we encountered earlier based on the two - speculatively possible - brothers!

In any case, as the Government counsel has submitted, the Judge records approvingly, birth pangs and "discriminatory unconstitutionality" are inevitable in the short run:

...in a society of chronic inequality and scarcity of employment, actual equality could never be midwived without birth pangs, and discriminatory unconstitutionality could not vitiate programmes meant to achieve real-life equality, unless we took a pragmatic view.²

He dismisses apprehensions about inefficiency with invective: the apprehensions that are being voiced are a "caricature", he declares. "If *barijans* were excluded would railway accidents have a long holiday?" he demands. "Courts are not credulity in robes!"³

Counsel present a report of the Railways, they present newspaper items about accidents and the like. He dismisses these with scorn:

The furious charges of inefficiency in administration,

The arguments of the other become "furious charges"

injected by incompetence imported through SC & ST candidates and by frustration and demoralisation of the non-SC & ST members who were passed over by their less competent juniors, was sought to be supported by reliance on the report of the Railway Accidents Enquiry Committee, 1968. There was reference in it to discontent among supervisors *inter alia* on account of the procedure of reservation of posts for SC & ST. It is true that the Report has a slant against the SC & ST promotion policy

The finding of the Enquiry Committee becomes "a slant against..."

¹*Ibid*, at 298, para 96.

²*Ibid*, at 267, para 30.

³*Ibid*, at 279, para 58.

notwithstanding the assurance given by the Railway Board to the Committee that instructions had been issued not to relax standards in favour of SC & ST members where safety was involved.

And now see how the Judge disposes of empirical material that has been placed before the Court:

We need hardly say that it is straining judicial gullibility to breaking point to go that far. This is an *argumentum ad absurdum* though urged by petitioners with hopeful ingenuity.

Not a word, not the shred of a fact that would show that the findings of the Report cannot be relied upon. Instead, the dismissal – that to ask us to believe the Report of the experts "is straining judicial gullibility to breaking point," it "is an *argumentum ad absurdum*." How is it either? On the contrary, are the assertions of the Judge not the ones that strain our gullibility to breaking point?

"Nor are we concerned with certain newspaper items and representations about frustration and stagnation," Justice Krishna Iyer says. This from a Judge who was of the group that revelled in taking *suo moto* account of newspaper reports, and converting letters into writs!

"Surely, extraneous factors, however passionately projected, cannot shake or shape judicial conclusions which must be founded on constitutional criteria and relevant facts only."¹ How are findings of experts appointed to inquire into accidents *irrelevant*? How are newspaper reports that deal with the issue at hand *irrelevant*? As for extraneous factors not shaking judicial conclusions, recall the sensitivity and alertness with which the Judge took account of them when Mrs. Indira Gandhi came to him for staying the operation of the Allahabad High Court judgment.

Next, Justice Krishna Iyer maintains, the new relaxations are just a little more of what has already been accepted in the past:² The circulars in question provided that if a Scheduled Caste or Tribe employee is graded "good", that grading shall be treated as "Very Good"; if he is graded as "Very Good", that assessment shall be treated as "Outstanding". That is no big deal, declares the Judge:

¹*Ibid*, at 281, para 61.

²*Ibid*, at 277-78, 282.

Annexure 'H' is bad for unconstitutionality according to the petitioners for many reasons. For one thing, an SC/ST employee gets one grading higher than otherwise assignable to him on the record of his service. So much so, if he is "good" he will be categorised as "very good". This fiction or fraud in grading is said to be a vice rendering the promotional prospects unreasonable. We do not agree. Superficially viewed, this clumsy process of reclassifying ability may strike one as disingenuous. Of course, this concession is confined to only 25 per cent [*"only 25 per cent"*!] of the total number of vacancies in a particular grade or post filled in a year. So there is no rampant vice of *every harijan* or *girijan* jumping over the heads of others.

Would the effect on administration become "a vice" only when "*every harijan* or *girijan* jumps over the heads of others"?

More importantly, we think this is only an administrative device of showing a concession or furtherance of prospects of selection. Even as under Article 15(4) and Article 16(4) lesser marks are prescribed as sufficient for SCs & STs or extra marks are added to give them an advantage, the regrading is one more method of boosting the chances of selection of these depressed classes. There is nothing shady about it.

Is the effect on administration any the less if the dilution of standards is open, in full light than if it is shady?

If there is advancement of prospects of SC & ST by addition of marks or prescribing lesser minimum marks or by relaxing other qualifications, I see no particular outrage in re-categorisation which is but a different mode of conferring an advantage for the plain and understandable reason that SCs & STs do need some extra help. It is important to note that the prescribed minimum qualifications and standards of fitness are continued even for SCs & STs under Annexure 'H'.¹

The Judge had been emphatic in *N.M. Thomas* about how benefits of reservations are being monopolized by the better-off among the categories for which reservations have been provided. He declared with great force that this neutralized and defeated the very purpose of reservations. Now, as we noticed in passing earlier when we

¹*Ibid*, at 294, para 84.

considered his ringing pronouncements in *N.M. Thomas*, the same Judge dismisses the same fact with a shrug:

Maybe, some of the forward lines of the backward classes have the best of both the worlds and their electoral muscle *qua* caste scares away even radical parties from talking secularism to them. We are not concerned with that dubious brand. In the long run, the recipe for backwardness is not creating a vested interest in backward castes but liquidation of handicaps, social and economic, by constructive projects. All this is in another street and we need not walk that way now.¹

Three favoured devices there: dismiss the matter as pertaining to a few deviants – "We are not concerned with that dubious brand"; push it aside for some future occasion – "All this is in another street and we need not walk that way now." And pass the task on to someone else:

The argument is that there are rich and influential *barijans* who rob all the privileges leaving the serf-level sufferers as suppressed as ever. The Administration may well innovate and classify to weed out the creamy layer of SCs/STs but the court cannot force the State in that behalf.²

This from an activist Judge who delighted in "forcing the State" to do many a thing!

But isn't all this based on nothing but "caste"? The Scheduled Castes are not "*castes*", Justice Krishna Iyer maintains. Indeed, he extrapolates and in three steps comes close to pronouncing that the "backward castes" aren't *castes* either! Scheduled Castes are not *castes* – that is the first step; Scheduled Tribes aren't *castes* in any case – that is the second step, though the point has nothing to do with the assertion that preceded or succeeds the truism; and, therefore, those classified as "Other Backward Classes" aren't *castes*! This is how his logic runs:

Terminological similarities are an illusory guide and we cannot go by verbal verisimilitude. It is very doubtful whether the expression caste will apply to Scheduled Castes. At any rate, Scheduled Tribes are identified by

¹*Ibid*, at 297, para 92.

²*Ibid*, at 299, para 98.

their tribal denomination. A tribe cannot be equated with a caste. As stated earlier, there are sufficient indications in the Constitution to suggest that the Scheduled Castes are not mere castes. They may be something less or something more and the time badge is not the fact that the members belong to a caste but the circumstance that they belong to an indescribably backward human group. Ray, C.J., in *Kerala v. Thomas* made certain observations which have been extracted earlier to make out that "Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste". Since a contrary view is possible and has been taken by some Judges a verdict need not be rested on the view that SCs are not castes...¹

The successor progressive finds the preceding one to have been insufficiently committed

Justice O. Chinnappa Reddy cites these words and propositions in justification for enlarging the claims of reservationists, only to chastise them as insufficient, as smacking of apologia. In *Vasanth Kumar*, he says

While we agree that competitive skill is relevant in higher posts, we do not think it is necessary to be apologetic about reservations in posts, higher or lower, so long as the minimum requirements are satisfied. On the other hand, we have to be apologetic that there still exists a need for reservation. Earlier we extracted a passage from Tawney's *Equality* where he bemoaned how degrading it was for humanity to make much of their intellectual and moral superiority to each other...²

Members of Scheduled Castes and Tribes, other constituents of "weaker sections of the people" have long journeys to make, Justice O. Chinnappa Reddy reminds us in *Vasanth Kumar*. He warns: "The days of Dronacharya and Ekalavya are over...." Who was resting his case on the assertion that the days of Dronacharya and Ekalavya are still around? But how could any of that detain a progressive? The cliché allusion hurled, it is time for the next invective.

And that is not long in coming! The Judge castigates fellow judges for their "superior, elitist, patronizing, paternalistic" approach to

¹*Ibid*, at 289, para 77.

²*K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 765, para 76.

the question of reservations. And, on his reading, this superior, paternalistic, patronizing attitude has nothing to do with the merits of the matter, nothing to do with what the country requires, nothing to do even with law. It is rooted in and is nothing but an expression of the fact that those who advance arguments such as merit and efficiency are persons from one side of the "real conflict".

"One of the results of the superior, elitist approach," Justice O. Chinnappa Reddy declares in *Vasanth Kumar*, "is that the question of reservation is invariably viewed as the conflict between the meritarian principle and the compensatory principle. No, it is not so. The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis"¹ – presumably, among this "class of people who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living" are Justice Chinnappa Reddy's fellow judges, including judges on the same Bench for some of them advance considerations of merit and efficiency in this very case!

Zero sum

Occasionally, even a progressive acknowledges that the real solution is faster growth. But his prescription suggests that such passages are just a verbal nod. Having held that apprehensions about standards falling are just "merit-mongering" by those whose personal interests are liable to be affected; having legitimized reservations of two-thirds of vacancies in higher posts on the ground that these are not "considerably in excess of 50 per cent"; having insisted that the only way to secure the economic interests of the Scheduled Castes and Tribes is to give them a share in posts of the State, to give them a share of power, that the only way to give them a share in power is to give them a proportion not considerably in excess of 50 per cent in the higher posts of the State apparatus, Justice Krishna Iyer says that the real solution is growth, that is to enlarge the size of the cake! The "chronic drought of employment opportunities despite talent enough

¹*Ibid*, at 737, para 35.

to make deserts bloom," he says, leads to the tragic result: "The vast human potential of the *barijans* and *girijans*, one-fifth of the Indian people, goes to thistles and every communal effort to twist the politics of power for promoting chances of getting jobs becomes inevitable, caste being a deep rooted pathology in our country." "Thus jobbery, politics, casteism and elections make an unholy, though invisible, alliance against national development which alone can liberate Indians from social and economic privation. If democracy itself thus plays into the hands of hostile forces, the jurisprudence of keeping the backward as backward and perpetuation of discrimination as a vested caste right may prevail as a rule of life."

While the whole tenor of his judgment is doing precisely that, Justice Krishna Iyer warns, "The remedy of 'reservations' to correct inherited imbalances must not be an overkill. Backward classes, outside the Scheduled Castes and Tribes, cannot bypass Article 16(2) save where very substantial cultural and economic disparity stares at society" – compare these words with what the same Judge says elsewhere on this very point. "The dubious obsession with 'backwardness' and the politicking with castes labelled backward classes may, on an appropriate occasion, demand judicial examination. The politics of power cannot sabotage the principles of one man, one value."

So, what is the remedy? "We need now, not stagnation wearing the mask of stability and scrambling acrimoniously over the same shrunken cake, but progress by the constructive process of explosive rural development and exploitation of the untapped human potential of the Scheduled Castes and Scheduled Tribes. Sterile 'reservations' will not help us go ahead unless, alongside of it, we have heroic national involvement of the masses in actual action, not paper-logged plan exercises. In the last analysis, privation can be banished only by production, discontent by distributive justice and litigation by socially relevant justice. The writ petitions are, regrettably, negative, although the driving force of penury deserves sympathy. This, perhaps, is a materialist interpretation of 'service litigation' and a grim footnote to these writ petitions."¹

¹*Akshil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 301-02, paras 101-02.

That compliment to his construction apart – "this, perhaps, is a materialist interpretation of 'service litigation'" – till these passages, the Judge has been eloquent on the other side of the "real conflict"!

It isn't just that in this very judgment, Justice Krishna Iyer endorses dilution of standards; reservations of 66⅔ per cent; reservations not just at entrance but in promotions; reservations in promotions not just at lower levels but in the higher posts too; he goes further and, in a judgment of the Supreme Court, exhorts caste groups – the Scheduled Castes and Tribes on the one hand and the Backward Castes on the other – to forge alliances so that they may jointly wrest what is on offer!

"Our founding fathers, familiar with social dialectics and socialist enlightenment, surely would have intended to bring both these have-not categories together as a broad brotherhood against the die-hard establishment and would never have contemplated a fratricidal strategy which would blind and divide brothers in distress – the *dalits* and the *soshits* – and harm the integration of the nation and its developmental march," the Judge says. "Unless by dialectical approach sociologists lay bare this false dilemma of *dalits* versus *soshits*, the growing distrust in democracy will deepen, the jurisprudence of constitutional revolution and egalitarian justice will fade in the books and the founding hopes of January 26, 1950, will sour into cynical dupes of the masses, decades after."

He returns to this exhortation as he closes his judgment. "The economically backward and the socio-economically backward truly belong to the 'have-not' camp and *must jointly act to bring about a transformation of the economic order* by putting sufficient pressure and make Article 38 a living reality," Justice Krishna Iyer exhorts. "Estrangement between the two categories *weakens the militancy of a joint operation* to inject social justice in the current economic order... Even Administration will do well to remember that Indian despair, after infinite patience, may augur danger unless 'the sorry scheme of things entire' is remoulded nearer to Article 38."¹

Justice Reddy has no patience for the chimera that the solution may lie in faster growth. "There is not enough fruit in the garden and so those who are in, want to keep out those who are out," he declares.

¹*Ibid*, at 266, para 26, and at 300, para 100.

We should pause a moment, and read that again – “There is not enough fruit in the garden and so those who are in, want to keep out those who are out”. This is precisely the fatuous zero-sum notion which held India back for thirty years – that it is not possible for all to grow together, that the quantum of fruit is fixed, that, therefore, if one set gets more, the other set will inevitably get less.

And Justice Reddy has more to say: “The disastrous consequences of the so-called meritarian principle to the vast majority of the under-nourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be stated” – another favourite device: when you cannot adduce evidence to substantiate your assertion, declare that the proposition is too obvious to need substantiation!

But that is just the opening salvo.

In any case, what is "merit"?

"And, what is merit?" Justice O. Chinnappa Reddy asks in words that will be picked up by an opportunist and unnerved politician later, and the words of that politician will in turn be echoed by another judge of the Supreme Court. Talk of creating an "echo effect"!

"There is no merit in a system which brings about such consequences," he says. "Is not a child of the Scheduled Castes, Scheduled Tribes or other backward classes who has been brought up in an atmosphere of penury, illiteracy and anti-culture, who is looked down upon by tradition and society, who has no books and magazines to read at home, no radio to listen, no TV to watch, no one to help him with his home work, who goes to the nearest local board school and college, whose parents are either illiterate or so ignorant and ill-informed that he cannot even hope to seek their advice on any matter of importance, a child who must perforce trudge to the nearest public reading room to read a newspaper to know what is happening in the world, has not this child got merit if he, with all his disadvantages is able to secure the qualifying 40 per cent or 50 per cent of the marks at a competitive examination where the children of the upper classes who have all the advantages, who go to St. Paul's High School and St. Stephen's College, and who have perhaps been specially coached for the examination may secure 70, 80 or even 90 per cent of the marks? Surely, a child who has been able to jump so many hurdles may be expected to do better and better as he progresses in life." "If spring flower he cannot be, autumn flower he may be," the Judge says. "Why then, should he be stopped at the threshold on an alleged meritarian principle?"

Is there no way out? Is this justice? "The requirements of efficiency may always be safeguarded by the prescription of minimum standards. Mediocrity has always triumphed in the past in the case of the upper classes. But why should the so-called meritarian principle

be put against mediocrity when we come to Scheduled Castes, Scheduled Tribes and backward classes?"¹

That a person who is assigned a job has grown up in difficult circumstances does not make the work that has to be completed easier. That a person has the potential to acquire the necessary skills in the future, that there is the possibility that he will bloom in autumn, does not help when the work has to be done here and now. And when this is said, it is not in any way any verdict on some "intrinsic worth of the person as a human being"; it is not any judgement about the heights that the person can or cannot climb eventually. It is just an assessment about the point at issue: who has the attributes here and now to do the job that has to be done here and now? This much must have been obvious to the Judge, for he escapes into grandiloquence, to put it no higher. This is the *only* point at issue at that moment. The Judge-advocate of reservations *evades* the issue by making out that the one raising the question is actually, deep down convinced that the candidate is of little worth as a human being; he is convinced that, do what the person might, he will just not be able to scale the necessary heights ever...

"Efficiency is very much on the lips of the privileged whenever reservation is mentioned," declares Justice Reddy. "Efficiency, it seems, will be impaired if the total reservation exceeds 50%; efficiency, it seems, will suffer if the 'carry forward' Rule is adopted; efficiency, it seems, will be injured if the Rule of reservation is extended to promotional posts. From the protests against reservation exceeding 50% or extending to promotional posts and against the carry forward rule, *one would think that the civil service is a Heavenly Paradise into which the archangels, the chosen of the elite, the very best may enter and may be allowed to go higher up the ladder.*"

But does the reasoning not go the other way? Had the civil service been Heavenly Paradise, it could not have suffered much from the induction of a few less-than-archangels. It is precisely because it is just another tenuous human institution that it cannot survive dilution of standards.

"But the truth is otherwise," the Judge continues. "The truth is that

¹*K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 737-38, para 35.

the civil service is no paradise and the upper echelons belonging to the chosen classes are *not necessarily* models of efficiency."

Notice two points: first the "not necessarily"; second, the operational proposition the Judge is advancing – as the "chosen classes" in the "upper echelons" are "not necessarily" "models of efficiency", the overall quality of the service will not suffer if another lot that is below par is inducted into it!

Next come another "not necessarily", a deft sleight of words, and more invective.

"The underlying assumption," the Judge asserts, "that those belonging to the upper castes and classes, who are appointed to the non-reserved posts will, because of their presumed merit, 'naturally' perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes."

Pause for a moment, and read that sentence again: "*presumed merit*", "*'naturally'* perform better", "clear stream of efficiency will be *polluted*", "sacred precincts", on the one side; and "*infiltration*", "*vicious assumption typical of the superior approach of the elitist classes*", on the other. An objective Judge with an open mind?

"There is neither statistical basis nor expert evidence to support these assumptions that efficiency will *necessarily* be impaired if reservation exceeds 50%, if reservation is carried forward or if reservation is extended to promotional posts." As it may not be "necessarily" impaired, it will not be impaired! Q.E.D.

"Arguments are advanced and opinions are expressed entirely on an *ad hoc* presumptive basis," says the Judge. What else is he himself doing in the passage? "The age long contempt with which the 'superior' or 'forward' castes have treated the 'inferior' or 'backward' castes is now transforming and crystallizing itself into unfair prejudice, conscious and subconscious, ever since the 'inferior' castes and classes started claiming their legitimate share of the cake, which naturally means, for the 'superior' castes, parting with a bit of it." Does the allegation that the argument is born of nothing but "age long contempt", of "unfair prejudice" not itself smack of "unfair prejudice," conscious rather than subconscious, if I may add? And what is the "empirical evidence" which shows that giving some of "the cake" to

one section must “necessarily” entail that others have to “part with a bit of it”?

“Although in actual practice their virtual monopoly on elite occupations and posts is hardly threatened, the forward castes are nevertheless increasingly afraid that they might lose this monopoly in the higher ranks of government service and the professions,” the Judge continues. What is the “statistical basis” or “expert evidence” “to support these assumptions” of the Judge about the fear that he says has gripped the forward castes? Is he not burying arguments that he finds inconvenient by pasting motives on others?

“It is so difficult for the ‘superior’ castes,” the Judge continues, “to understand and rise above their prejudice, and it is so difficult for the inferior castes and classes to overcome the bitter prejudice and opposition which they are forced to face at every stage.”

“Always one hears the word ‘efficiency’ as if it is sacrosanct and the sanctorum has to be fiercely guarded,” Justice Reddy declares. “*Sacrosanct*”, “*sanctorum*”? That is a gross caricature of the proposition that in reserving half the posts in civil services and allotting them on the basis of birth, the State must pay heed to the effects that such reservation shall have on the efficient functioning of institutions. To insinuate that anyone who talks of preserving the efficiency of government service is making it out to be “sacrosanct”, that he is elevating it into a “sanctorum” is to assert that he is making out that efficiency alone matters – to the exclusion of other values, like justice. If that be the case, what should one say about the Constitution itself, and its framers? After all, in Article 335, it says, “The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, *consistently with the maintenance of efficiency of administration*, in the making of appointments to services and posts in connection with the affairs of the Union or of a state.” In laying this down, is the Constitution itself guilty of “prejudice”? Were framers of the Constitution also in the grip of dread that the lower castes would eat up the cake? Are Article 335, and the prudence underlying it, also “a vicious assumption typical of the superior approach of the elitist classes”? Are they also instances of “the age-long contempt with which the ‘superior’ or ‘forward’ castes have treated the ‘inferior’ or ‘backward’ castes”?

"'Efficiency' is not a *mantra* which is whispered by the Guru in the *Sishya's* ear," scoffs the Judge. But who says it is?

And then follows a truism – with that precautionary "necessarily" thrown in – of the kind we encounter in several other judgments also of this genus. "The mere securing of high marks at an examination *may not necessarily* mark out a good administrator" – with that the fact that persons who have scored much higher marks in the competitive examinations are ever so often denied entrance even as persons with much, much lower marks get admissions and appointments is disposed. We shall examine this proposition as we proceed, but a tiny question is in order even at this stage. If marks in examinations are so unreliable a guide as between non-SC/ST/OBC candidates on the one hand and SC/ST/OBC candidates on the other, how come they are accepted *within* the reserved categories? After all, at some cut-off point some members of the SC/ST/OBC are denied entrance – and they are denied entrance solely because they have not scored marks in the examination above that cut-off point. Indeed, when they are asserting that reservations will not lower efficiency, these very judges assert that the SC/ST/OBC candidates have to go through "fierce competition" *vis a vis* other SC/ST/OBC candidates. Surely, that "fierce competition" takes place through these very tests, and the candidates are judged by the same yardstick – of marks scored in these tests. In view of what the Judge says, is that defensible? May it not be that by this "arbitrary" rule we are excluding a truly gifted administrator?

Justice Chinnappa Reddy follows this assertion by the usual empathy premise. "An efficient administrator, one takes it," says the Judge, "must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, tackle bravely the problems of a large segment of the population constituting the weaker sections of the people. And who better than the ones belonging to those very sections?" How many cases can the Judge point to of officers "belonging to those very sections" who did exceptional work for the weaker sections? The more conspicuous cases – of officers in U.P. and Bihar who came from among the reservationists and were as corrupt and self-seeking as others; of politicians of these and other states who rode to power as messiahs of "those very sections" – certainly do not bear out the Judge's assertion.

"Why not ask ourselves why 35 years after Independence, the position of Scheduled Castes, etc. has not greatly improved?," demands the Judge. In fact, the position *has* greatly improved. But if, as the Judge maintains, the position of the Scheduled Castes and Tribes has "not greatly improved", why not turn the question around, and ask why, after 50 years of progressively higher reservations, the position of Scheduled Castes and Tribes has not improved more than it has?

"Is it not a legitimate question to ask," the Judge demands, "whether things might have been different, had the District Administrators and the state and Central bureaucrats been drawn in larger numbers from these classes?" Could it not be the other way? That the position of *all sections* – including these sections – would have been much, much better, had administrators been selected and posted and promoted, not because of their birth but strictly on merit? If the entire administrative structure had been steered not into these ditches – of jobs and promotions as matters of right, as entitlements – but towards accountability and performance?

Having characterized merit and efficiency in these terms, the Judge seems to hedge a bit – but he carefully chooses words that only darken the characterization. He says, "We do not mean to say that efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that *one need not make a fastidious fetish of it...* We do not, therefore, mean to say that efficiency is altogether discounted. All that we mean to say is that *it cannot be permitted to be used as a camouflage to let the upper classes in its name monopolize the services, particularly the higher posts and the professional institutions.* We are afraid we have to rid our minds of many cobwebs before we arrive at the core of the problem. The quest for equality is self-elusive, we must lose our illusions, though not our faith. It is the dignity of man to pursue the quest for equality."

The net effect of his peroration is obvious: anyone talking of merit and efficiency has to establish that he is not making "a fastidious fetish" of it, that he is not assisting the "upper classes" perpetuate their monopoly of higher posts and professional institutions; on the other hand, anyone berating efficiency and merit, in particular anyone denouncing them on the grounds that they have become "a fastidious fetish", that they are being used as an instrument for perpetuating

upper caste monopolies is naturally speaking up for the dispossessed! At the least, the former is still a prisoner of illusions, his mind is still enmeshed in cobwebs, he has still not reconciled himself to the dignity of every man!¹

The same arguments get repeated in judgment after progressive judgment. With a new quotation or two thrown in from time to time. In *Indra Sawhney*, Justice P.B. Sawant comes down heavily on the argument that merit will be compromised by reservations. He starts by invoking a passage from Panditji's *Discovery of India*. He quotes Panditji to have written,

Therefore, not only must equal opportunities be given to all, but special opportunities for educational, economic and cultural growth must be given to backward groups so as to enable them to catch up with those who are ahead of them. Any such attempt to open the door of opportunities to all in India will release enormous energy and ability and transform the country with amazing speed.

This is not the place for an exegesis of Panditji's views on the matter. But five points are in order even in regard to this brief passage. First, notice that in it Panditji is urging that "opportunities" be opened to all, that "equal opportunities be given to all" and not that outcomes be "equalized" by excluding the meritorious from those opportunities. Second, he advocates that "special opportunities" be given to those who have been left behind, not exclusive opportunities through a device such as reservations. Third, the object that he wants to attain through these "special opportunities" is "to enable them to catch up with those who are ahead of them," not to enable them to dodge standards that are necessary for executing the work at hand. Fourth, in this passage, Panditji is advocating "special opportunities for educational, economic and cultural growth"; how does it become an argument for reservations in government services? Finally, if it is all right to invoke a passage that does not talk of reservations from the *Discovery of India* written in the mid-1940s, why not heed what he wrote at his height as Prime Minister in 1961 on reservations directly?

¹On all this, see *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714 at 738-40; recalled often, for instance in *Indra Sawhney v. Union of India*, *op. cit.*, at 506, para 404; *Ashok Kumar Gupta*, *op. cit.*, para 36.

But, of course, the progressive judge is not to be deterred by such considerations. He is on to compassion, and more. Justice Sawant continues, "The inequalities in Indian society are born in homes and sustained through every medium of social advancement. Inhuman habitations, limited and crippling social intercourse, low-grade educational institutions and degrading occupations perpetuate the inequities in myriad ways." Why not then address these handicaps? Why not improve habitations? Why not multiply high-grade educational institutions? Why not clean up occupations, and trigger new ones? But the Judge is on to other things.

First comes the relative weight of identical attainments: "Those who are fortunate to make their escape from these all-pervasive dragnets by managing to attain at least the minimum of attainments in spite of the paralysing effects of the debilitating social environment, have to compete with others to cross the threshold of their backwardness." And with that we are back to practice. The Judge asks, as did Justice Chinnappa Reddy, "Are not those attainments, however low by the traditional standards of measuring them, in the circumstances in which they are gained, more creditable? Do they not show sufficient grit and determination, intelligence, diligence, potentiality and inclination towards learning and scholarship?"

Next comes the question of elementary fairness: "Is it fair to compare these attainments with those of one who had all the advantages of decent accommodation with all the comforts and facilities, enlightened and affluent family and social life, and high quality education? Can the advantages gained on account of the superior social circumstances be put in the scales to claim merit and flaunted as fundamental rights?"

Then, the hypothetical: "May be in many cases, those coming from the high classes have not utilised their advantages fully and their score, though compared with others, is high, is in fact not so when evaluated against the backdrop of their superior advantages – may even be lower. With the same advantages, others might have scored better."

Then, the conclusive example: "In this connection, Dr Ambedkar's example is worth citing. In his matriculation examination, he secured only 37.5% of the marks, the minimum for passing being 35%. (See *Dr. Ambedkar* by Dr. Dhananjay Keer). If his potentialities were to be

judged by the said marks, the country would have lost the benefit of his talent for all times to come."

From the example, the Judge proceeds to generalize, and berate assessment yardsticks in general – without, as is customary, taking the trouble, in this judgment or elsewhere, to work out the alternative yardstick. "Those who advance merit contention, unfortunately, also ignore the very basic fact," the Judge writes, "(though in other contexts, they may be the first to accept it) – that the traditional method of evaluating merit is neither scientific nor realistic. Marks in one-time oral or written test do not necessarily prove the worth or suitability of an individual to a particular post, much less do they indicate his comparative calibre. What is more, for different posts, different tests have to be applied to judge the suitability."

And then, *a la* Krishna Iyer, there is the difference between competence and suitability: "The basic problems of this country are mass oriented," Justice Sawant says. "India lives in villages, and in slums in towns and cities. To tackle their problems and to implement measures to better their lot, the country needs *personnel who have first-hand knowledge of their problems and have personal interest in solving them. What is needed is empathy and not mere sympathy.* One of the major reasons why during all these years after Independence, the lot of the downtrodden has not even been marginally improved and why majority of the schemes for their welfare have remained on paper, is perceptibly traceable to the fact that the implementing machinery dominated as it is by the high classes, is indifferent to their problems..."¹

The analogy from teaching

Proceed for a moment to what Justice Sawant himself holds in the same judgment in regard to the teaching profession. The Judge holds, "It is worth serious consideration whether reservations in the form of preference instead of exclusive quota should not be resorted to in the teaching profession in the interests of the backward classes themselves." Read the reasons he gives for this, and as you do so, ask whether the exact words do not apply with equal force to general governance and administration. Justice Sawant tells us,

¹*Indra Sawhney v. Union of India*, *op. cit.*, at 506-07, paras 404 to 408.

Education is the source of advancement of the individual in all walks of life.

And so is general governance – as the people of U.P. and Bihar and Jharkhand, swept into an abyss on casteist slogans, are surely realizing today.

The teaching profession, therefore, holds a key position in societal life. It is the quality of education received that determines and shapes the equipment and the competitive capacity of the individual, and lays the foundation for his career in life.

The quality of general governance, the proper functioning of institutions “holds a key position in societal life.” It is the quality of governance that “determines and shapes the equipment and the competitive capacity” not just of the individual but of the entire country, and “lays the foundation” for its future life.

It is, therefore, in the interests of all sections of the society – socially backward and forward – and of the nation as a whole, that they aim at securing and ensuring the best of education.

Exactly so: “It is, therefore, in the interests of all sections of the society – socially backward and forward – and of the nation as a whole, that they aim at securing and ensuring the best of” administration.

The student whether he belongs to the backward or forward class is also entitled to expect that he receives the best possible education that can be made available to him and correspondingly it is the duty and the obligation of the management of every educational institution to make sincere and diligent efforts to secure the services of the best available teaching talent.

Precisely: “The citizen whether he belongs to the backward or forward class is also entitled to expect that he receives the best possible governance that can be made available to him and correspondingly it is the duty and the obligation of the management of every institution to make sincere and diligent efforts to secure the services of the best available administrative talent.”

In the appointments of teachers, therefore, there should be no compromise on any ground.

Indeed: "In the appointments of administrators, therefore, there should be no compromise on any ground."

For as against the few who may get appointments as teachers from the reserved quota, there will be over the years thousands of students belonging to the backward classes receiving education whose competitive capacity needs to be brought to the level of the forward classes. What is more, incompetent teaching would also affect the quality of education received by the students from the other sections of the society. However, whereas those coming from the advanced sections of the society can make up their loss in the quality of education received, by education at home or outside through private tuitions and tutorial classes, those coming from the backward classes would have no means for making up the loss. The teachers themselves must further command respect which they will do more when they do not come through any reserved quota. The indiscipline in the educational campus is not a little due to the incompetence of the teachers from whatever section they may come, forward or backward. It is, therefore, necessary that there should be no exclusive quota kept in the teaching occupation for any section at all.

Just substitute "citizens" for "students"; and "administrators", or "ministers" for that matter, for "teachers" and see how apposite the Judge's counsel is for our country! Right to the point that when standards in the police collapse, the rich can make their private arrangements for security, the dispossessed are the ones who are left completely exposed to every rogue.

The Judge then proceeds to prescribe that preference be shown to persons from backward castes provided they have the same qualifications as candidates from forward castes; and that to ensure this preference, we should ensure both that the methods of evaluation are "not the traditional test of marks but a scientific test based, among other things, on the aptitude in teaching, the capacity to express and convey thoughts, the scholarship, the character of the person, his interest in teaching, his potentiality as a teacher..." and also that members of backward castes are in the selection committees that will evaluate the candidates.¹

We can be confident that any comparable list of "aptitude", "character", "capacity", etc. that is drawn up to assess administrators

¹*Ibid*, at 549, paras 508-10.

will be rejected by the Judge for its failure to assign sufficient weight to the fact that only those who have first hand experience of the problems of the backward can have the capacity and commitment to work for the backwards! Empathy is necessary in administration. Not in education!

Justice T.K. Thommen takes the matter beyond caste. His enumeration, born out of as much empathy, while vaulting us over one problem, lands us in another. He declares, "The city slum dwellers, the inhabitants of the pavements, afflicted and disfigured in many cases by diseases like leprosy, caught in the vicious grip of grinding penury, and making a meagre living by begging besides the towering mansions of affluence, transcend all barriers of religion, caste, race, etc. in their degradation, suffering and humiliation." A good, non-casteist, secular enumeration. Then, the grandiloquence: "They are the living monument of backwardness and a shameful reminder of our national indifference, a cruel betrayal of what the Preamble to the Constitution proclaims." And from that to the policy prescription: "No matter what caste or religion they may claim, *their present plight of animal like existence, living on crumbs picked from garbage cans or coins flung from moving cars – a common painful sight in our metropolis – entitles them to every kind of affirmative action to redeem themselves from the iniquities of past and continuing discrimination.*"¹

Hence, they have an *entitlement*. Second, the criterion that qualifies them for the entitlement is "their present plight of animal like existence, living on crumbs picked from garbage cans or coins flung from moving cars." Third, to what does their animal-like existence entitle them? To "every kind of affirmative action to redeem themselves from the iniquities of past and continuing discrimination."

Now, the tenor of all these judgments has been that the one kind of affirmative action which will "redeem them from the iniquities of past and continuing discrimination" is that half the jobs in Government be reserved for them. Imagine what the condition of administration will be when half the posts are manned by "the city slum dwellers, the inhabitants of the pavements, afflicted and disfigured in many cases

¹*Ibid*, at 442, para 270.

by diseases like leprosy," etc., and when these are given to them only because they are caught in "animal like existence, living on crumbs picked from garbage cans or coins flung from moving cars." No one will quarrel with the Judge's admonition that the State must take steps for their "rehabilitation and resettlement", for providing them education, health care and the like. The point at issue is "all kinds of affirmative action" which in these judgments has been taken to imply primarily that half the jobs at all levels in Government must be kept aside for the categories specified by the concerned authorities.

Opportunism as principle

In any case, why should we be concerned with merit and efficiency of individuals at all? When the whole system is without merit, what is the point in demanding efficiency and merit of individuals? In fact, to demand that they be efficient in serving a system that itself deserves to be overthrown is to demand that they perpetuate a perversity. That is not some maniacal extremist speaking. That is what the Supreme Court has held time and again. And for buttressing its assertions in this regard, it has taken recourse to the rhetoric of one of the most opportunist of politicians we have had in the last half century. V.P. Singh had got frightened when the person he had just dismissed from Deputy Prime Ministership announced that he would hold a rally in Delhi's Vijay Chowk. Frightened, he lunged for the Mandal Commission Report, and announced an avalanche of additional reservations. As was typical of him, he elevated his opportunism to principle. Speaking in Parliament, he declared,

We talk about merit. What is the merit of the system itself? That the section which has 52% of the population gets 12.55% in Government employment. What is the merit of the system? That in Class I employees of the Government it gets only 4.69%, for 52% of the population in decision-making at the top echelons it is not even one-tenth of the population of the country; in the power-structure it is hardly 4.69. I want to challenge first the merit of the system before we come to the question on the merit, whether on merit to reject this individual or that. And we want to change the structure basically, consciously, with open eyes. And I know, when changing the structures, there will be resistance...

That was opportunism at its apogee – he had not challenged it till

then in his long career! But it is this passage that is quoted with manifest approval by an activist Judge – in *Indra Sawhney*!¹

As further authority, Justice Jeevan Reddy cites Justice Chinnappa Reddy – the peroration that we have already encountered about how the “real conflict” is between those “who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis,” about how there just isn’t enough fruit in the garden so that if one set gets more, the other will necessarily be deprived of that portion.

Article 16(4) is not a poverty alleviation programme, Justice P.B. Sawant pronounces. Its aim is not economic upliftment. Its singular aim is to redistribute power to those who have been kept out of the State apparatus, and, through that redistribution, to end their educational, social and economic backwardness.² And this class, Justice Sawant asserts, is not less than 77½ per cent of the population of the country.

One has but to formulate the matter in such terms and two inconveniences jut out. First, given universal adult franchise, given the way caste-based political parties have captured power in state after state, given the decisive sway they have acquired over the Centre, given that the backwards are 77 per cent and more of the population, will power not automatically get redistributed towards them? In fact, isn’t power already being redistributed towards them? Take the index of which the Mandal Commission made so much. The Commission contrasted the politics of the Southern states and those of the North. It set out how high-caste Chief Ministers and cabinets had been replaced by ministers and Chief Ministers from the lower castes in the former but not in the latter.³ Today, that goal has been accomplished in the North too. Indeed, the central Parliament is dominated by and shoved and pushed by those who speak in the name of the backwards. Its standards – of functioning, of what passes for discourse – too have been brought down to what these caste leaders had wrought in the state legislatures.

¹*Indra Sawhney v. Union of India*, *op. cit.*, at 650, para 674.

²*Ibid.*, at 538, 543, paras 482, 495.

³C.f., *Report of the Backward Classes Commission*, First Part, Volumes I and II, Government of India, New Delhi, 1980, Chapter VIII, pp. 31-36.

If only these Commissions were to teach our people to look at the character of a person as a Chief Minister or minister rather than at his caste-character, we would be saved from the abyss into which we are being pushed. But that apart, as the project of transferring power is well on the way to being accomplished, why does the additional instrument of reservations need to be continued?

The progressive Judge shifts immediately to another tack. By itself, political power does not bring real power, he suddenly maintains. Political power has to be actually exercised to banish the disadvantages and backwardness of socially, educationally and economically deprived sections. And there lies the rub. "The only known medium of exercising the power is the administrative machinery," the Judge states. "If that machinery is not sympathetic to the purpose of the exercise, the political power becomes ineffective, and at times is also rendered impotent. The reason why, after forty-four years of Independence and of vesting of political power in the hands of the people, the same section which dominated the nation's affairs earlier, continues to do so even today, lies here."¹

Hence, reservations.

Hence, reservations continued indefinitely.

In any case, merit and efficiency won't be affected

Can it be that equality must not be ensured by giving the disadvantaged "concessions, relaxations, facilities, removing handicaps and making suitable reservations," asks Justice Fazal Ali in *N.M. Thomas*, "merely because they cannot come up to the fixed standards"? That is the first step: belittle the standards that are being used. But always make sure, you don't propose any alternative ways of measuring suitability or ability, lest critics get a chance to compare the standards you have proposed with the existing ones, and ask how your set is better.

In several parts of the country, people lack communications, they do not have transport and health facilities, Justice Fazal Ali reminds us. "Could we say that the citizens hailing from these areas should continue to remain backward" – pause a minute: who has said that the people of these regions "should continue to remain backward"?

¹*Indra Sawhney, op. cit.*, at 504, para 401.

How does asking the question whether reservations of jobs for them is the optimal remedy, from their point of view and from the point of view of ensuring that the State is able to discharge its functions in the best possible manner, how is asking this question tantamount to maintaining that the people of these regions "should continue to remain backward"? – "*merely because they fall short of certain artificial standards fixed by various institutions?* The answer must be in the negative...."¹

The standards are "artificial". Failing them is "merely" to not come up to artificial constructs.

Positively perverse

But belittling is just the first step. In the reckoning of these judgements, not only are notions of merit and efficiency little more than devices of the upper castes to perpetuate their hegemony, the tests that are used to assess them are so flawed as to make them not just worthless but positively perverse!

To subject the candidates and employees from the backward castes to the standards demanded of others is "not only illogical, inconceivable, unreasonable and unjustified but also utterly overlooks the stark grim reality of the SEBCs suffering from social stigma and ostracism in the present day scenario of hierarchical caste system," declares Justice Ratnavel Pandian in *Indra Sawbney*. If candidates from the backward castes are required to go through the same "rigid test mechanism being the highly intelligence test [*sic.*] and professional ability test as conditions of employment, certainly these conditions will operate as 'built-in headwinds' for the SEBCs." He brushes aside the apprehension that the kinds of preferential treatment – in relaxed standards, in accelerated promotions, etc. – recommended by the Mandal Commission will vitiate the entire atmosphere of governance, that it would cause demoralization all round: "Conversely can it not be said that the non-implementation of the recommendations would result in demoralization and discontent among the SEBCs?" he demands.²

And the Judge lays down a test for how long measures like reservations must continue. They must continue even when "the

¹*N.M Thomas, op. cit.*, at 377, para 158.

²*Indra Sawbney, op. cit.*, at 400, para 143.

shackles whether of iron chains or silken cords are removed and the shackled person has become unfettered." "He must be given a compensatory edge *until he realises* that there is no more shackle on his legs because even after the removal of shackles he does not have sufficient courage to compete with the runner who has been all along unfettered."¹

Justice Sawant, as we saw, declares that Article 16(4) is not a poverty alleviation measure. Is it by chance an institution for psychological rehabilitation? Are government offices meant for the rehabilitation? Is this rehabilitation the mandate of the Constitution? Or is the mandate that reservations, etc., are to be provided without compromising efficiency of administration?

Next, Justice Pandian pushes the usual obfuscatory argument. "A programme of reservation may sacrifice merit but does not in any way sacrifice competence," he declares. How come? "Because," the Judge says, "the beneficiaries under Article 16(4) have to possess the requisite basic qualification and eligibility" – a subtle mis-statement in view of the fact that the "basic qualification" is demonstrably lowered in their case; "and have to compete among themselves though not with mainstream candidates" – another sleight of words in view of the imperative need to attract and induct the very best into the governmental structure.²

Not just the tests, the assessers are perverse

We have already encountered Justice Chinnappa Reddy's observation, "The mere scoring of high marks at an examination may not necessarily mark out a good administrator." That sort of setting-aside-the-test-by-merely-raising-a-question is a much favoured technique, and we encounter it in many judgments. Thus, to take one instance, in *Saurabh Chaudri v. Union of India*, we are told,

The essence of equality is enshrined in Article 14 of the Constitution of India. But does it mean that equality clause must be applied to all citizens, to all situations? It is true that the country should strive to achieve a goal of excellence, which in turn would mean that meritorious students should not be denied pursuit of higher studies. This itself brings us the question, *who*

¹*Ibid*, at 403, para 153.

²*Ibid*, at 404, para 156.

*is to judge the merit and what are the standards therefor? It is extremely difficult to lay down a foolproof criteria. Success or failure of a candidate in one examination or the other may not lead to infallible conclusion as regard the merit of a candidate so as to achieve excellence. The larger question, therefore, would be how to and to what extent balance should be struck....*¹

Notice that just a doubt is raised in such passages about the extent to which the criteria that have been adopted are actually reliable. But in subsequent judgments, the *doubt* is invoked as a *conclusion*, as a conclusion that has been arrived at by the Court *on the basis of empirical evidence!*

In the judgment in which he cites the dictum of Justice Chinnappa Reddy at length, Justice K. Ramaswamy builds a few more storeys on it – it isn't just that assessments "may not necessarily" indicate true merit, the assessments in vogue sprout from prejudice and other collateral considerations, he says. "The question then is: what is the meaning of the phrase 'efficiency in administration'? In *D.T.C. case*, it was observed in para 275 that 'the term efficiency is an elusive and relative one to the adept capable to be applied in diverse circumstances. [sic.] *If a superior officer develops liking towards a sycophant, though corrupt, he would tolerate him and find him to be efficient and pay encomiums and corruption in such cases stands as no impediment. When he finds a sincere, devoted and honest officer to be inconvenient, it is easy to cast him/her off by writing confidential reports with delightfully vague language imputing him to be 'not up to the mark,' 'wanting public relations,' etc. At times they may be termed to be 'security risk'. Thus they spoil the career of the honest, sincere, devoted officers. Instances either way are galore in this regard...*"²

Words sweeping enough to throw into doubt every assessment! For, this being the assessment of the Supreme Court, it will be up to the person writing that confidential report to prove that he has not been swayed by sycophancy, that he is not condoning corruption, that he has not been prejudiced by the fact that the sincere, devoted, honest officer is an impediment to the wrong that he, the supervising officer, wants to do!

¹*Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146, at 164, para 38.

²*Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, at 231, para 34.

Indeed, the judges seem to have no doubt about the perversity of those whose responsibility it is to recruit, to assess, to fill vacancies. "It is common knowledge," says the Supreme Court, "that selections are not objectively being made to select the candidates belonging to the *Dalits* and tribes to fill up the vacancies reserved for them though qualified candidates are available to be promoted/appointed, with a view to see that reserved vacancies are got filled up and the same are passed off as eligible candidates being not available so as to ensure that carry-forward vacancies either exceed 50% of the accumulated total vacancies or that selection goes beyond three years so as to make the Government de-reserve the vacancies..."¹

Hence,

- ❑ The system has no merit;
- ❑ Notions of merit and efficiency are "a pure Aryan invention", a mere device to perpetuate the hegemony of upper castes;
- ❑ Measures and procedures by which merit and efficiency are adjudged are at best irrelevant, ever so often they are little short of perverse.
- ❑ The ones charged with assessing officers are prejudiced; they are out to do in the honest subordinate who happens to be inconvenient precisely because he is honest and is not prepared to make himself available for the wrong that the assessing officer wants to accomplish.

This being the case, why should one be efficient? Indeed, to be efficient in such circumstances would only mean that one is being an efficient instrument of a system that should actually be overthrown. Why slave for a system which, the Supreme Court judges themselves tell us, is rigged to exploit us and our kin?

¹*Post-Graduate Institute of Medical Education and Research v. K.L. Narasimhan*, (1997) 6 SCC 283, at 300, para 16.

This, or else

A lecture on induction!

Both in regard to initial recruitment as well as in regard to promotions, a series of relaxations has been granted for the reservationists – one and all by maintaining the fiction that these will *not* affect the efficiency of administration! A Parliamentary Committee lists the relaxations.

The upper age limit is to be relaxed by five years in their case.

Where requirements of experience have been specified ("Should have held post 'X' for 'Y' years before he can be considered for post 'Z'."), these will be relaxed.

Where standards of suitability for a post have been prescribed for direct recruitment, these will be relaxed.

Where promotion is by what is known as the "non-selection method", if a sufficient number of candidates is not available, eligible SC/ST candidates may be picked up "till the bottom of the seniority list for filling up the reserved vacancies."

Where promotion is by the "selection method", "the normal zone of consideration is extended up to five times the number of vacancies proposed to be filled up by promotion in order to make up the shortfall of suitable SCs/STs in the normal zone of consideration."

Separate interviews are held for the SCs/STs in direct recruitment – so that, in effect, assessment of them is not impacted by the qualifications or attainments of non-reservationists.

Wherever Limited Department Competitive Examinations are held for promotion, the qualifying marks shall be relaxed in the case of reservationists.

Wherever qualifying examinations are prescribed for promotion, these are relaxed for the reservationists. "SC/ST candidates not up to the general qualifying standard could be considered for promotion provided they are not found unfit," the prescription runs.

Where standards of evaluation have been prescribed for promotion, the reservationists “not meeting the prescribed benchmark could be promoted provided they were not found unfit for promotion.”¹

That, of course, is just a standard list. As and when the political class in a state has felt compelled to appease the strong and well-organised reservationist castes – organised as well inside services as outside – they have enlarged such relaxations further. The qualifying score for promotion had already been put at 40 per cent for SC/ST officers as against 60 per cent for general category officers. As even greater latitude was demanded, in the case of selection posts, a new scheme was introduced: “the best among the failures scheme.” Under this scheme, even if a reservationist scored no more than 20 per cent, he would be promoted to the higher selection post – nominally, a condition was attached to his promotion: he would be given practical training in the post for six months; and the promotion will be regularized when he is found to have imbibed the lessons of the training. This further facility is made available, even though the reservationists are given special coaching before they appear for the selection.

But reflect just on that standard list itself. The rule now says that the reservationists must be promoted “provided they are not found unfit.” In a word, unless someone records a definite finding that the person in question is “found unfit” for promotion, he *will* be promoted. But who dare record such a finding in today’s atmosphere? *He* will be held to account, not the person he has found unfit: *he* will have to prove that *he* is not actuated by anti-SC/ST/OBC prejudice.

Such concessions – their number, their extent, the very terms used: “*relaxation* of experience,” “*relaxation* of standards,” “*relaxation* in qualifying marks,” “*relaxation* in qualifying examination,” “*relaxation* in standards of evaluation” – can leave no doubt that, put in force, the relaxations cannot but lower the efficiency of administration.

Given the mandate of Article 335, given the judgments in which it has declared that concessions given under Articles 16(4) must

¹For such lists, see for example, Rajya Sabha, *Department-related Parliamentary Standing Committee on Home Affairs, Sixty-sixth Report on the Constitution (Eighty-eighth Amendment) Bill*, 28 July, 2000, Rajya Sabha Secretariat, pp. 5, 6, 33-34.

conform to the requirement prescribed in Article 335, given the judgments in which it has held time and again that efficiency of administration is of paramount importance – given all this, the Supreme Court has pronounced that such relaxations are not permissible.

The nine-judge Bench did so in *Indra Sawhney v. Union of India* in 1992.

A two-judge Bench reiterated it in *S. Vinod Kumar v. Union of India* in 1996. The Bench also made clear that the protection of five years that had been given to reservations in promotions did *not* apply to these relaxations.

Three years later, in 1999, a five-judge Bench again emphasized in *Ajit Singh v. State of Punjab* that such relaxations were not permissible in law. On the contrary, it said, “the provisions of the Constitution must be interpreted in such a manner that a sense of competition is cultivated among all service personnel, including the reserved categories.”

A legal opinion

With each judgment, the clamour of the political class became shriller. Government promised to take back the instructions it had issued to implement the judgments. It sought the opinion of its highest law officer. The opinion drew attention to the judgments. It pointed out that the Government was bound by them. Only to add that, if the contrary had to be done, that could be done by amending the Constitution, though that Amendment would, of course, be open to challenge in courts. Next, it proceeded to make a suggestion to clear the passage, so to say, through the courts. It advised,

An amendment of the Constitution may be considered by way of a proviso to Article 335 rather than as a sub-Article or proviso to Article 16. This could conceivably enable the Government to contend that the Right to Equality, which is a basic structure of the Constitution, is not, in any manner, being affected by the amendment, and that the Article requiring maintenance of efficiency of the administration is being suitably amended and thus no part of the basic structure of the Constitution is damaged or destroyed.¹

¹Department Related Parliamentary Standing Committee on Home Affairs, Sixty-sixth Report on the Constitution (Eighty-eighth Amendment) Bill, *op. cit.*, p. 10.

Lawyers and judges alone, I suppose, will understand how, something that endangers the Basic Structure of the Constitution when it is put in Article 16, does not do so when it is put in Article 335!

The opinion contained a suggested text of the proviso. The politicians made the text even more comprehensive. And the Constitution was amended for the eighty second time.

Article 335 is now diluted by the following proviso:

Provided that nothing in this Article shall prevent in making of any provision in favour of the members of the Scheduled Castes and Scheduled Tribes for *relaxation in qualifying marks in any examination or lowering the standards of evaluation*, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

In a word, qualifying marks shall be lowered, standards of evaluation too shall be lowered in regard to promotions "to any class or classes of services or posts." But the fiction stays: efficiency of administration is of paramount importance. And Prime Ministers keep announcing plans for administrative reform!

Another dyke blown

There was one straw left: in *R.K. Sabharwal v. State of Punjab*, a case which, like all others of this genre, was keenly contested, the Constitution Bench of the Supreme Court held that, while SCs/STs would receive accelerated promotions through the Roster System, they would not get a leap over their colleagues in seniority also. In other words, if, by virtue of the Roster, X leaped over Y who was his senior by, say three years, when Y got his promotion in the normal course, he would regain his seniority of three years. The point became decisive in many a case in which, X, having leaped over Y because of the Roster, would claim that, as he had been longer in the higher post, he had a right to be promoted to the *next* post before Y even though Y had by now come to the same level. Through this process, X asserted a pre-emptive right even to general category posts – posts that were not reserved for SCs/STs. The Supreme Court held that in general category posts, merit and seniority would be the criteria, that according preferential treatment even in these posts to the reservationists would amount to reverse discrimination.

Time and again, the Supreme Court struck "consequential seniority" down as violative of the Constitution. Those who have leap-frogged because of reservations in promotions, because of the Roster System, etc. will not acquire seniority over their colleagues from the general category, the Court held: because of these devices, "X" may leap over the general category officer "Y" who is senior to him, and get to the next grade; but when and if, in the normal course, "Y" also gets promoted to that higher level, he shall be given his seniority in reckoning the two for the still higher post.

For reasons such as these, in a series of cases, such as *Vir Pal Singh Chauhan*, the Court held that "seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position, i.e. with reference to their *inter se* seniority in the lower grade. The rule of reservation gives accelerated promotion, but it does not give the accelerated 'consequential seniority'..." Therefore, if an SC/ST employee has secured accelerated promotion because of the Roster,

Whenever a question arises for filling up a post reserved for Scheduled Caste/Tribe candidate in a still higher grade then such candidate belonging to Scheduled Caste/Tribe shall be promoted first but when the consideration is in respect of promotion against the general category post in a still higher grade then the general category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either principle of seniority-cum-merit or merit-cum-seniority.

Apart from the fact that any other construction would violate Article 14 and 16(1), the Court drew attention to the consequence that would follow if this rule were to be disregarded. It said,

If this rule and procedure is not applied the result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered service on the basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions. This will not be consistent with the requirement or the spirit of Article 16(4) or Article 335 of the Constitution.¹

¹*Ajit Singh Januja v. State of Punjab*, (1996) 2 SCC 715, at 735, para 16. See also, *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745; and *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684.

The Constitution Bench of the Court specified the law beyond doubt again in *Ajit Singh(II) v. State of Punjab*.¹ It reiterated the decision in *Ram Prasad v. D.K. Vijay*.² And again in *Jatinder Pal Singh v. State of Punjab*.³ And yet again in *Sube Singh Bahmani v. State of Haryana*.⁴

Several state governments continued to disregard the decisions of the Supreme Court with impunity. Accordingly, the matter came up yet again before the Supreme Court in 2000. Once again, the Supreme Court ruled unambiguously: granting seniority along with accelerated promotions is a complete violation of the Constitution – indeed, to such an extent does it breach the fundamental right to equality of the general category employees that it violates the Basic Structure of the Constitution. In *M.G. Badappanavar v. State of Karnataka*,⁵ the Supreme Court recalled the series of judgments in which it had struck down rules and schemes that conferred seniority to reservationists in this manner, and held, “The roster promotions were... meant only for the limited purpose of due representation of backward classes at various levels of service. If the rules are to be interpreted in a manner conferring seniority to the roster-point promotees, who have not gone through the normal channel where basic seniority or selection process is involved, then the rules... will be *ultra vires* Article 14 and Article 16 of the Constitution of India. Article 16(4-A) cannot also help. *Such seniority, if given, would amount to treating unequals equally, rather, more than equals.*”⁶

The Court went over the reasons for its decisions once again, and emphatically stated,

Equality is a basic feature of the Constitution of India and any treatment of equals unequally or of unequals as equals will be violation of the *basic structure* of the Constitution of India. [Italics in the original.] That is one more reason why, according to us, the roster-point promotees cannot be given seniority. Therefore, if seniority is given, it will violate the equality principle which is part of the basic structure of the Constitution.

¹(1999) 7 SCC 209.

²(1999) 7 SCC 251.

³(1999) 7 SCC 257.

⁴(1999) 8 SCC 213.

⁵(2001) 2 SCC 666.

⁶*M.G. Badappanavar v. State of Karnataka*, (2001) 2 SCC 666, at 672, para 12.

Even Article 16(4-A) cannot, therefore, be of any help to the reserved candidates. That is the legal position under the Constitution of India.¹

Accordingly, the Court ruled that grave injustice had been done to those general level officers who had been robbed of promotions and had retired in the meantime. But for the operation of this unconstitutional scheme, they would have secured "substantial benefits which were unjustly denied to them."²

The underlying reasoning had been explained by the Supreme Court at length in *Indra Sawhney* itself. In that case, the Court had stressed that, while the rationale for reservations was that unequals should not be treated equally, and the backward castes were deemed to be disadvantaged *vis a vis* the forward ones because of the centuries of oppression to which they had been subjected,

But once the advantaged and disadvantaged, the so-called forward and backward, enter into the same stream then the past injustice stands removed. And the length of service, the seniority in cadre of one group, to be specific the forward group, is not as a result of any historical injustice or undue advantage earned by his forefather or discrimination against the backward class, but because of the years of service that are put in by an employee, in his individual capacity. This entitlement cannot be curtailed by bringing in again the concept of victimization.

Equality either as propagated by theorists or as applied by courts seeks to remove inequality by "parity of treatment under parity of condition." But once in "order to treat some persons equally, we must treat them differently" has been done and advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating the effects of past discrimination but perpetuating it.³

In a word, the Supreme Court had reiterated the law in this regard – unambiguously and repeatedly.

The judiciary had tried to save this, the last dyke. The Executive moved that the Constitution be amended to overturn these

¹*Ibid*, at 672-73, para 13.

²*Ibid*, at 674, para 19.

³*Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 624, paras 623-24.

judgments, and the legislature, with much acclamation, passed the 85th Amendment. The 77th Amendment passed not long ago, had, as we have seen, introduced a new provision – Article 16(4A). This was now modified, and, henceforth, was to read:

Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, *with consequential seniority*, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

As a result, the person securing accelerated promotions because of the Roster System will in addition secure a pre-emptive claim to the still higher post – even when the latter is a general category post.

Faith to the rescue

Apart from the effect that the induction of those who are not up to the mark may have on the character and norms of a service; apart from the values and attitudes which such preference will stoke among those to whom it is made available, the consequence is that, here and now, the quality of the service, the quality of students in educational institutions is naturally lower than it would otherwise have been. This is a simple, one may say tautological consequence. The progressive judges often acknowledge this, but they put their faith in hope, saying that they are sure that *eventually* the candidates who are taken in through reservations will overcome their initial handicaps.

Just as often, they take recourse to denial – plain and simple. They declare that the fact that candidates are being inducted who at the relevant time do not have the qualifications which have been prescribed will affect quality is just an unsubstantiated conjecture. In a typical peroration, a Bench of the Supreme Court, invoking homilies from an earlier ruling of two Judges, breaks into a lecture. It reminds us, “to prove a fact, inference must be drawn on the basis of evidence and circumstances. They must be carefully distinguished from conjectures or speculation. The mind is prone to take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of one connected whole.” Is this not an exact description of what the Court is doing in the sentences that follow its homily?! The Court continues, “There must be evidence

direct or circumstantial to deduce necessary inferences in proof of the fact in issue. There can be no inferences unless there are objective facts, direct or circumstantial, from which the other fact which is sought to be established can be inferred. In some cases, the other facts can be inferred, as much as is practical, as if they had been actually observed. In other cases, the inferences do not go beyond reasonable probability. If there are no positive proved facts, oral, documentary or circumstantial, from which the inferences can be made, the method of inference fails and what is left is mere speculation or conjecture. Therefore, for an inference of proof that a fact in dispute has been held established, there must be some material facts or circumstances on record from which such an inference could be drawn. In the absence of any issue and facts and proof thereof, the inference that reservation in promotion deteriorates the efficiency of administration remains only a conjecture or an opinion based on no evidence...."

By this peroration, and without an iota of "facts and proof" that the lecture calls for, reservations are justified not just at the time of induction into a service, say, but also in promotions.¹

Contrast this peroration on deduction/induction with the counsel that the Court rightly gives in another case. It transpired that persons from a few of the better-off sections among the intended beneficiaries were filling up all the seats that had been reserved. Accordingly, the Government in Andhra issued a notification partitioning the deprived castes into four segments, and assigned specified proportions of the reserved seats to members of each category. Striking down the notification, the Supreme Court notes, *inter alia*, that the groups in question – Relli and Adi-Andhra – are hardly educated. "Only 2% of the members of the said community have studied in secondary school," it notes. "No one has ever been admitted in any engineering discipline or other professional disciplines." This has a direct bearing on the extent to which decreeing reservations will help the communities, even if we disregard what doing so will spell for efficiency of administration: "The said facts clearly go to show that providing reservation for them in engineering or medical discipline or in public service would not solve their problem. Without such basic education, the members belonging to the said community would not

¹See, *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201.

be getting admission either in the engineering or medical colleges or other professional courses and as such the question of their joining public service may not arise at all. Now, even for the post of Class IV employees, qualification of passing matriculation examination is provided." Accordingly, the Supreme Court holds, "*What was necessary in the situation was to provide to them scholarships, hostel facilities, special coaching, etc., so that they may be brought on the same platform with the members of other Scheduled Tribes, viz., Madiga and Mala, if not with the other backward classes.*" "Unless children of the said community are educated, the provision for both for education as also public service would be a myth for them and ultimately in view of the impugned legislation for all intent and purport," the Court notes, and its observation applies to many a community that has been sought to be beguiled by reservations, "the benefit thereof would go to other categories. The State, in our opinion, should take positive steps in this behalf."¹

The Court correctly does *not* put its faith in hope – that "these sections will overcome their initial handicaps eventually." The Court rightly eschews populism and bases its declaration on the sound premise that the groups and individuals must first be prepared for the jobs they are to be assigned before granting them the right to claim those jobs as a matter of right. Transpose the premise, transpose the very words to instances in which the persons who are getting into medical and engineering courses are little equipped for them, and see how well they fit. But in this case, the Supreme Court maintains that first the candidates must be equipped. In others that, once inducted, they will eventually overcome their initial handicaps. Induction in one set of cases, deduction in others!

Relaxation to the point of waiver

If the State may relax standards while assessing its own employees, why should it not be possible to relax standards in educational institutions? If standards can be relaxed, why can the relaxation not be to any extent, even to the extent of waiving them altogether? Sure enough, that is exactly what has happened.

¹*E.V. Chinnaiah v. State of Andhra Pradesh*, (2005) 1 SCC 394, at 435, para 114.

Even in the early 60s, the Court had been in no doubt about the imperative need to ensure that standards do not suffer. The Supreme Court had been emphatic about this in *M.R. Balaji*. The awakening in all sections of society has led to an ever increasing demand for higher education, it had noted. But then cautioned, "While it is necessary that the demand for higher education which is thus increasing from year to year must be met and properly channelised, we cannot overlook the fact that in meeting that demand standards of higher education must not be lowered." "The large demand for education may be met by starting larger number of educational institutions, vocational schools and polytechnics," the Court observed. "But, it would be against the national interest to exclude from the portals of our universities qualified and competent students on the ground that all the seats in the universities are reserved for weaker elements in society. As has been observed by the University Education Commission,¹ *'he indeed must be blind who does not see that mighty as are the political changes, far deeper are the fundamental questions which will be decided by what happens in the universities.'* Therefore, in considering the question about the propriety of the reservation made by the impugned order, we cannot lose sight of the fact that the reservation is made in respect of higher university education." If only, someone would read out such warnings to the cynical opportunists who are ramming reservations down the throats of the few remaining islands of excellence – the IITs and IIMs. "The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave prejudice to national interests if considerations of merit are completely excluded by whole-sale reservation of seats in all technical, Medical or Engineering colleges or institutions of that kind. Therefore, *considerations of national interest and the interests of the community or society as a whole cannot be ignored in determining the question as to whether the special provision contemplated by Article 15(4) can be special provision which excludes the rest of the society altogether.* In this connection, it would be relevant to mention

¹The Commission was headed by Dr. Sarvapalli Radhakrishnan, and had Dr. Zakir Hussain and other distinguished educationists as members.

that the University Education Commission which considered the problem of the assistance to backward communities, has observed that *the percentage of reservation shall not exceed a third of the total number of seats*, and it has added that the principle of reservation may be adopted for *a period of ten years...*¹

The Supreme Court recalled what it had held even in *Rangachari*, a judgment much favoured by reservationists. Even while recognizing that the upliftment of the disadvantaged is of "paramount importance", the Court had stressed, *"It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration"*. That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency; but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts." "It is also true that the reservation which can be made under Article 16(4) is intended merely to give adequate representation to backward communities," the Court pointed out. *"It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees"*. In exercising the powers under Article 16(4) the problem of adequate representation of the backward class of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration..."²

The scales are tilted

As populism took hold of the political class, as what passes for progressivism came to grip public discourse, the Court too got taken in. At first, the formulations were still in terms of "striking a balance", but soon the balance began to be weighted in a particular direction. Thus in *A. Periakaruppan*, the Supreme Court maintained that a balance had to be struck between the immediate interests that accrue

¹*M.R. Balaji v. State of Mysore*, (1963) Supp. (1) SCR 439, para 32.

²*General Manager, Southern Railway v. Rangachari*, (1962) 2 SCR 586, 596.

to the Nation from inducting those who are best qualified and the long-term interests that accrue from lifting the disadvantaged – again, that zero-sum notion of change and growth: may it not be that the best way to lift the downtrodden, the best way to ensure that they get the best possible services like public health facilities is to induct only those who are at the time the work has to be done the best equipped to do it? Furthermore, the Supreme Court said, “Advantages secured due to historical reasons should not be considered as fundamental rights.” The fundamental right in question was equality. The proposition that the Court now adopted was that a category of candidates – those who had not been born to parents from the lower castes – were not claiming the fundamental right to equality guaranteed to them by the Constitution; they were demanding that “the advantages they had secured due to historical reasons” should be considered as fundamental rights!

By the time we come to *State of Madhya Pradesh v. Nivedita Jain*, the scale has been turned upside down. In this case too the Supreme Court was dealing with institutions of higher education. Indeed, the question before it pertained to one of the very disciplines on which it had pronounced in *M.R. Balaji*, namely medical colleges. But this time round, the same Supreme Court held that *Government can relax qualifying criteria to whatever extent it deems necessary for filling the seats set aside by reservations, even to the extent of doing away altogether with the requirement* – in that case the requirement was that the candidate must have obtained at least a prescribed level of minimum marks. And the Court insisted that doing so does *not* amount to relaxing the standards of education. For, the Court maintained, the candidate will have to fulfill the same standards as everyone else *after* she or he is admitted and advances in their studies. And so, we can be confident that this doing away with even so fundamental a condition will do no harm to the standard of doctors who will emerge from the courses!¹

¹*State of Madhya Pradesh v. Nivedita Jain*, AIR (1981) SC 2045; (1981) 4 SCC 296.

Induction in practice!

Judges like Justice H.R. Khanna and Justice A.P. Sen, of course, drew attention to the plain meaning of what had been provided in the Constitution, but aggressive populism is what prevailed. In *N.M. Thomas*, Justice Khanna reminded all concerned of the scheme that had been adopted in the Constitution – a scheme to help the Scheduled Castes and Tribes but in ways and to the extent that doing so did not impair the all-important efficiency of governance. In view of the mandate imposed by Article 335, “it is not permissible to waive the requirement of minimum educational qualification and other standards essential for the maintenance of efficiency of service.”¹

Four years after the Supreme Court had put its seal on the complete jettisoning of the required qualifications, Justice A.P. Sen warned of the consequences of such misplaced fervour. The words he used, the institutions to which he referred were ones that were to come up again before the Court, and the Court’s pronouncements in regard to these in later judgments demonstrate how much the Court has been swayed by populist discourse over the years. Justice Sen pointed to the injury that would be done all round if standards were diluted, and how the scheme of the Constitution had carefully safeguarded the country against such a ditch. “I wish to add that the doctrine of protective discrimination embodied in Article 15(4) and 16(4) and the mandate of Article 29(2) cannot be stretched beyond a particular limit,” he said, standing up to the populism that had taken hold of the Court. “The State exists to serve its people. There are some services where expertise and skill are of the essence. For example, a hospital run by the State serves the ailing members of the public who need medical aid. Medical services directly affect and deal with the health and life of the populace. Professional expertise, born of knowledge

¹*State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 393-94, para 205.

and experience, of a high degree of technical knowledge and operational skill is required of pilots and aviation engineers. The lives of citizens depend on such persons. There are other similar fields of governmental activity where professional, technological, scientific or other special skill is called for. In such services or posts under the Union or States, we think there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments."¹

Notice that such pronouncements were already becoming rarer with each passing year. Notice too that the Court had already come down many notches – from upholding the necessity for standards at all times in all institutions at all levels, to upholding them at least at the higher levels of all institutions, to upholding them, as in Justice Sen's text, in some disciplines in some institutions. This was made specific soon – there shall be no reservations in "specialities and super-specialities", the Court declared in *Indra Sawhney*, using some of the same examples as Justice Sen had enumerated – engineering, aviation, medical services... The fate which even that dyke has since met, we shall soon encounter.

From this it was but a step for the Court to turn Nelson's eye, so to say, towards bare facts also. With even passing acquaintance with judgments of our courts, including those of the Supreme Court, each of us can readily recall scores of judgments in which the verdict was made to turn on the narrowest difference of words, of dates of communications and circulars. But when activist judges are in mind of advancing social justice, so to say, they make light of even the most glaring facts.

A typical instance occurred in *Ajay Kumar Singh*. The Court records that at one stage the Counsel for the petitioners pointed out that if the principle that the Supreme Court had adumbrated in the case that was under discussion² were to be applied uniformly, it would adversely affect the legislative ambit that had been set apart for Parliament. Furthermore, building on what had been laid down in that case, a state government had now given the go-ahead to provide that "a student belonging to a reserved category obtaining

¹K.C. Vasanth Kumar v. State of Karnataka, (1985) Supp. SCC 714, at 772, para 88.

²State of Madhya Pradesh v. Nivedita Jain, (1981) 4 SCC 296.

one mark in entrance test would yet be eligible for admission in post-graduate courses in a situation where the eligibility percentage is, say, 50% for open competition candidates." The Counsel pointed out that this sort of a situation "is bound to affect the standards of education."

The Supreme Court dismissed the argument, observing, "In our opinion, Sri [Harish] Salve is over-drawing the picture. A perusal of the judgment in *Nivedita Jain* shows that the minimum eligibility marks prescribed for general candidates for admission to M.B.B.S. was [sic.] 50 whereas for Scheduled Castes/Scheduled Tribes candidates it was 40 marks...." But what the Court itself says in the very next sentence shows how right the Counsel was in his apprehension, and how blithely the Court had glided over facts. The Court continues, "During a particular year, it so happened that even after relaxing the minimum eligibility marks by 5%, Scheduled Castes/Scheduled Tribes candidates were not available in adequate number to fill the seats reserved for them. It was in such a situation that the government resorted to the exceptional step of removing the minimum required marks altogether for that year in exercise of power of relaxation." This was not a permanent feature, the Court says, it was just something done for that year. *

Just five paragraphs later, we come across another instance. The Court says that in that case too the minimum qualifying marks were 50% for general competition candidates and 40% for reserved category candidates. "Only when the students in requisite number were not available was [sic.] the said criteria reduced to 40% and 30% respectively." "This *small distinction* in the eligibility criteria can, by no stretch of imagination, be said to impinge upon the determination or coordination of standards in institutions of higher learning." We are in an environment in which cut-off marks for admission to different colleges in, say, the Delhi University are specified to the decimal point; an environment in which writs have been entertained and decided on differences in dates of recruitment, in marks in the second order of smalls. And yet a reduction from 50 per cent to 40 per cent, and then to 30 per cent is just "this small distinction"!¹

True, the Supreme Court concedes in *Ajay Kumar Singh* that some

¹For the instances, see *Ajay Kumar Singh v. State of Bihar*, (1994) 4 SCC 401, at 420, paras 27, 29.

of the earlier judgments of the Supreme Court itself were "premised on the assumption that reservations are basically anti-meritarian"; that in some of these judgments the Court had assumed that "reservation necessarily implies selection of less meritorious persons,"¹ and declares, "We are afraid, this assumption is without any basis." And that is enough!!

First, to the extent that merit and efficiency have to be sacrificed, the Supreme Court maintains, this is a price that just has to be paid for making good the promise that has been made in the Constitution – the promise of social justice for all, especially for members of the lower castes. In a passage that is often cited in subsequent judgments, such as *Indra Sawhney*, the Supreme Court puts the point as follows:

....The relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognize that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed.

That opening would have been enough to cause a little tremor in progressive hearts! In it, the significance of merit is conceded. And there is the unpardonable acknowledgement: that "the very idea of reservation implies selection of a less meritorious person." The very next sentence, however, retrieves the ground that is conceded in those lines:

We also firmly believe that given an opportunity, members of these classes are bound to overcome *their initial disadvantages* and would compete with – and may, in some cases, excel – members of open competition. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed it upon members of other classes and that what is required is an opportunity to prove it. It may *not*, therefore, be said that reservations are anti-meritarian. Merit there is even among the reserved candidates and the *small difference* that may be allowed at the stage of initial recruitment is bound to disappear *in course of time*. These members too will compete with and improve their efficiency along with others.

¹In this context the Court cites as examples *Chitrallekha v. State of Mysore*, AIR (1964) SC 1823; *Janki Prasad Parimoo v. State of Jammu and Kashmir*, (1973) 1 SCC 420; and *M.R. Balaji v. State of Mysore*, (1963) Supp. (1) SCR 439.

The retrieval is strained, however! That members who have to enter services today through reservations will eventually overcome their current disadvantages may be true – though the one way to induce them to do so is by *not* fomenting the culture, “This job is my right, it is my entitlement,” but by instituting a culture in which each person has to strive to attain a job and to keep it. But even if we assume that eventually everyone will make up the deficiencies that hobble him today, the Court shuts its eyes to the fact that *the job has to be done today*. If that job is done inadequately today, the prospects for *everyone* – including those for members of Scheduled Castes, etc. – will be fewer.

But the Supreme Court does not allow that sort of a consideration to come in the way – not in *Indira Sawhney*, nor in subsequent judgments. In *Ajay Kumar Singh*, the Court reproduces that passage of hope and faith in eventual outcomes, and builds several storeys on it.

No concession is being given to members of Scheduled Castes, etc. in passing examinations, it says. All that is being done is that they are being enabled to enter the course or service. Once they have entered, they have to learn as much as those who entered the course from the general quota, they have to perform as well in the jobs they are assigned. “This circumstance is a complete answer,” it declares, “to the argument of ‘less merit’”. No empirical study has been brought to our notice to establish that candidates admitted under reserved quotas generally lag behind in the matter of marks or proficiency in the final examinations. *They may enter under different categories but they come out as one class.*¹

The Court itself does not seem confident about that assertion for in the very next paragraph it has to deal with the fact that candidates who entered, say, an undergraduate medical course through reservations demand to be inducted into the post-graduate course also through reservations! They have already availed of reservations, the Counsel for the petitioners in *Ajay Kumar Singh* argued. How can they be entitled to another slew of seats through the reserved quota? On the Court’s own premise, though they entered the undergraduate course in a separate, preferential stream, as they have

¹*Ajay Kumar Singh, op. cit.*, at 408, para 6.

been made to learn as much as others during the course, as they have had to pass the same examination upon leaving the course, they leave the course as one class along with the general candidates. As this is the case, why should they need or have a right to reservations again at the bar of the post-graduate course? The Court's answer shows how little confidence it has in what it asserted in the passage we just encountered.

"Firstly, the assumption on the basis of which this argument is addressed is itself untenable," says the Court. "A candidate who is seeking reservation at the stage of admission to post-graduate course may not have availed of the benefit of reservation at the stage of admission to MBBS; he could as well have been admitted on his own merit in the general quota (open competition quota); but because the competition at the level of post-graduate medical courses is extremely acute, he may have to seek the benefit of reservation." Two points leap up from this new formulation. First, the last clause in the sentence is itself an acknowledgement that, although the candidate has had the same facilities to study the undergraduate course as other candidates, he has not been able to get sufficient grip over the subjects and again needs special treatment – that itself flies in the face of what the Supreme Court had asserted in the previous paragraph. Second, assume as the Court wants us to do, that this set of students had *not*, while others had got into the undergraduate course through reservations – why can we then not have a rule that *those who had availed of reservations in entering the undergraduate course shall not be entitled to reservations while entering the post-graduate course?*

Its empirical assertion out, the Court takes recourse to the silence of law. "Secondly," the Court proceeds, "there is no rule under Article 15(4) that a student cannot be given the benefit of reservation at more than one stage during the course of his educational career." But why not go by your own rulings that persons who have entered a stream become members of a single class, and to treat them differentially after that will be to treat equals unequally? And, hence, a violation of Article 14, which, in turn, is a basic feature of the Constitution.

The Court has a well-practised, frequently deployed evasion for an answer: "Where to draw the line is not a matter of law but a matter of policy for the State to be evolved keeping in view the larger interests

of the society and various other relevant factors." That from a Court that has drawn the line on so many matters!¹

Attention was next drawn to what the Court, following earlier judgments, had itself ruled in *Indra Sawhney*, namely that reservations are not defensible at higher levels in hierarchies, especially in certain areas. In a vital passage, the Supreme Court had said,

While on Article 335, we are of the opinion that *there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain*, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, *technical posts in research and development organisations/departments/institutions, in specialities and super-specialities in medicine, engineering and other such courses in physical sciences and mathematics, in defence services* and in the establishments connected therewith. Similarly, in the case of *posts at the higher echelons*, e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable.

...we are of the opinion that in certain services and in respect of certain posts, application of the rule of reservation may not be advisable for the reason indicated hereinbefore. *Some of them* are: (1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment. (3) Teaching posts of Professors – and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. *The list given above is merely illustrative and not exhaustive.* It is for the Government of India to consider and specify the service and posts to which the rule of reservation shall not apply but on that account the implementation of the impugned Office Memorandum dated 13th August, 1990 cannot be stayed or withheld.

Notice that, in this pronouncement in *Indra Sawhney*, the Supreme Court twice emphasized that the list it was giving of professions and posts in which reservations are not appropriate was merely

¹On the preceding, *Ajay Kumar Singh, op. cit.*, at 408-09, paras 4-8.

illustrative: "Some of these are...", it said; "The list given above is merely illustrative and not exhaustive," it repeated.

That was manifestly the case: after all, if the posts of pilots and co-pilots are to be excluded on the ground that the slightest compromise in standards in regard to them can endanger the lives of hundreds, on what logic would one allow compromises in regard to the standards of ground personnel – among them, engineers – who maintain the aircraft? Or personnel in the Air Traffic Control Towers at airports who direct the pilots? Or the security personnel who check luggage?

Furthermore, can it be that what holds for Control Towers at Airports holds less for those controlling the movement of trains?

Similarly, in medicine, what is a speciality or super-speciality and what is not? Neurology and cardiology are mentioned in Supreme Court judgments as specialities and super-specialities in which reservations should not be made. But is pediatric surgery any less of a speciality? Is orthopedic surgery less of a speciality? Or gastroenterology? Or the care of neo-natal or spastic children? Or Oncology?

When they want to support a proposition, the judges are apt to take passages like the foregoing from *Indra Sawhney* and locate the general reasoning or principle behind the words, and swiftly apply it to the matter at hand.

And when they don't? In *Ajay Kumar Singh*, confronted with its own declarations in *Indra Sawhney* and earlier cases, the Supreme Court takes recourse to fine distinction. "While making the above observations," the Supreme Court observes, "the Court was speaking of posts in research and development organisations, in specialities and super-specialities in medicines, engineering and such other courses. The Court was not speaking of admission to specialities and super-specialities. Moreover, M.S. or M.D. are not super-specialities." Notice the confounding: whether the discipline is a super-speciality relates to the *subject*; the Court confounds that with the *degree* in the subject!

"In any event," these judges now say, "this Court did not say that they were not permissible; the Government was asked to consider the advisability of providing for reservations in those posts having

¹ *Ajay Kumar Singh*, *op. cit.*, at 409, para 8.

regard to the nature and level of those posts."¹ This by a Bench of three judges, who thereby reduce to a complete nullity what nine judges had said in *Indra Sawhney*. But there is one tell-tale, commonality between the two Benches – one activist Judge!

There are cases aplenty in which the Supreme Court has addressed the question of admissions to courses in specialities and super-specialities. Among these, for instance, are the observations that the Court had recorded in *Dr. Jagadish Saran v. Union of India*.¹ In these, the Supreme Court observed *inter alia*,

...But it must be remembered that exceptions cannot overrule the rule itself by running riot or by making reservations as a matter of course, in every university and every course. For instance, you cannot wholly exclude meritorious candidates as that will promote substandard candidates and bring about a fall in medical competence, injurious, in the long run, to the very region.

Pause a moment, and notice how much ground the Court has already conceded. What, in its reckoning is impermissible? That "you cannot *wholly* exclude meritorious candidates..."

But, to proceed:

It is no blessing to inflict quacks and medical midgets on people by wholesale sacrifice of talent at the threshold. Nor can the very best be rejected from admission because that will be a national loss and the interests of no region can be higher than those of the nation. So, within these limitations, without going into excesses, there is room for play of the State's policy choices...

Flowing from the same stream of equalism is another limitation. The basic medical needs of a region or the preferential push justified for a handicapped group cannot prevail in the same measure at the highest scales of speciality where the best skill or talent, must be hand-picked by selecting according to capability. At the level of Ph.D., MD, or levels of higher proficiency, where international measure of talent is made, where losing one great scientist or technologist in-the-making is a national loss, the considerations we have expanded upon as important lose their potency. Here equality, measured by matching excellence, has more meaning and cannot be diluted much without grave risk. *The Indian*

¹(1980) 2 SCC 768, at 778, paras 20 to 23. See also *Pradeep Jain v. Union of India* (1984) 3 SCC 654.

Medical Council has rightly emphasised that playing with merit for pampering local feeling will boomerang. Midgetry, where summitry is the desideratum, is a dangerous art. We may here extract the Indian Medical Council's recommendation, which may not be the last word in social wisdom but is worthy of consideration:

'Students for postgraduate training should be selected strictly on merit judged on the basis of academic record in the undergraduate Course. All selection for postgraduate studies should be conducted by the universities.'

The case at hand concerned the decision of the Delhi University to reserve 70 per cent seats in post-graduate medical courses for those who had graduated from the Delhi University itself. But, surely, the point the Supreme Court was making about the need to ensure that only the best talent got into post-graduate medical courses, as well as the considerations underlying it, transcend the question of "institutional reservation". Similarly, recall what it said about the interest of a region *vis a vis* that of the country as a whole: "Nor can the very best be rejected from admission because that will be a national loss and the interests of no region can be higher than those of the nation." When that holds for a region, why not for a caste? Is it any less justifiable to hold, "Nor can the very best be rejected from admission because that will be a national loss and the interests of no caste can be higher than those of the nation"?

And from the choice of words – "medical midgetry", "midgetry, when summitry is the desideratum" – you would by now have guessed not just that the observations had fallen from a progressive activist, but from *which* progressive activist!¹

Notice too the approval with which in *Jagadish Saran* the Supreme Court cited the Regulation formulated by the Indian Medical Council. But in *Ajay Kumar Singh*, it dismisses that very regulation on the ground that this was just a recommendation, that it was in the nature of advice and is not a binding direction! True, the Indian Medical Council has made this recommendation; true that the Council is an autonomous organization; true its recommendation relates to a matter that falls squarely within the area for which the Council has been

¹Of course, from Justice V.R. Krishna Iyer, speaking for himself and Justice Q. Chinnappa Reddy! Their judgment has the usual prose on empathy also.

set up, but it was mere advice. And, in any case, though autonomous, the Council has to abide by general policies, laws, constitutional provisions.... This is the Court's rationale in *Ajay Kumar Singh*.¹

In the next case, the Court goes farther. True, the Medical Council has issued this Regulation, it says, but the state governments have the right to regulate admissions – after all, they are setting aside substantial amounts for medical and other education. True, Article 15(4) does not speak of or permit reservation in educational institutions; true, the Medical Council Regulations prohibit reservations in post-graduate courses on any ground whatsoever, “but it is too late in the day to question this power.”² In any case, even in *Jagadish Saran*, the Court, having stated how excellence could not be allowed to be compromised in specialities and super-specialities, had hastened to add that these observations did not apply to reservations that were made for Scheduled Castes and Tribes and backward classes under the Constitution. These are a constitutional mandate, the Court says.³

Recall the earlier assertion of the Supreme Court that reservations shall not entail any diminution of standards as they provide preferential treatment *only to enter* the course or service. After he enters, the reservation-candidate goes through the same courses, he handles the same jobs as general candidates, and he is judged by the same standards. This logic naturally leads the Court to maintain that, unlike what the judges had prescribed in *Indra Sawhney* as well as in earlier judgments, reservations must be extended to specialities and super-specialities also. Thus in *Post-Graduate Institute of Medical Education and Research v. K.L. Narasimhan*, the Court lays down,

The question is: whether by applying rule of reservation in admission into the specialities or super-specialities courses/faculties would lead to loss of proficiency or high excellence needed in the specialized or super-specialised faculties? In our considered view, it is not so. It is an accepted position that a student admitted to a medical course or a post-graduate course of study is required to pass the same standard of examination as is prescribed in the particular course of study. Equally, a student, admitted on

¹See, *Ajay Kumar Singh v. State of Bihar*, *op. cit.*, paras 17 to 24.

²See, for instance, *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146, para 43; *Ajay Kumar Singh*, *op. cit.*, paras 2, 4.

³See, *Jagadish Saran*, *op. cit.*, para 25; *Ajay Kumar Singh*, *op. cit.*, para 10.

reservation, is required to pass the same standard prescribed for a speciality or a super-speciality in a subject or medical science or technology. In that behalf, no relaxation is given nor sought by the candidates belonging to reserved categories. What is sought is a facility or opportunity for admission to the courses, Ph.D., speciality or super-speciality or high technology by relaxation of a lesser percentage of marks for initial admission than the general candidates. For instance, if the general candidate is required to get 80% as qualifying marks for admission into speciality or super-speciality, the relaxation for admission to the reserved candidates is of 10 marks less, i.e. qualifying marks in his case would be 70%. A doctor or a technologist has to pass the post-graduation or the graduation with the same standard as had the general candidate and has also to possess the same degree of standard. However, with the facility of possessing even lesser marks the reserved candidate gets admission. Thereby, the proficiency is not affected.¹

Having reached this far merely by elongation and brushing aside what it has itself held earlier, the Supreme Court elevates the enlargement of reservations to Justice – with a capital “J”! In *Post-Graduate Institute of Medical Education and Research*, the Supreme Court repeats the assertions we have encountered earlier – “the benefit of reservation does not *necessarily* imply down-grading the excellence”; the student who is inducted through reservations “is also *expected to have* the same degree of excellence”; “Securing marks is *not the sure proof* of higher proficiency, efficiency or excellence” – and raises the stake, so to say. It declares,

As stated earlier, the benefit of reservation does not *necessarily* imply down-grading the excellence. Every student after admission into the post-graduate speciality or super-speciality is required to undergo the same course of study, same standard and higher performance for qualifying the courses for conferment of the degrees in the respective specialities or super-speciality or technical subjects. In that regard, there is no relaxation given to the candidates belong to reserved categories. A student who would pass post graduation on par with the general candidates is also *expected to have* the same degree of excellence on par with general candidate, with a lesser benefit of marks only for admission into the course of study by relaxing the same standard of marks. Securing marks is *not the sure proof* of higher proficiency, efficiency or excellence. These are

¹*Post-Graduate Institute of Medical Education and Research v. K.L. Narasimhan*, (1997) 6 SCC 283, at 308, para 25.

matters of acquired ability by studious application of mind, skills in performance by the candidate concerned, be it general candidate or reserved candidate. It is a matter of application of the mind, constant assiduity to improve skills, capabilities and capacities and excellence in the subject or the field of action chosen by the candidate.

Up to this point, the Court is reiterating what its activist members have asserted in earlier judgments. Now comes the addition:

In that behalf, it is common knowledge that marks would be secured in diverse modes. It is no indicia that particular percentage of the marks secured is an index of the proficiency, efficiency and excellence. *They are awarded in internal examination on the basis of caste, creed, colour, religion, etc.*

Pause for a moment, and read that again: marks are awarded, says the Court, “on the basis of caste, creed, colour, religion, etc.” Is the Court under no obligation to provide empirical evidence before it condemns the examination system wholesale in this manner? Marks are awarded in India “on the basis caste, creed, colour, religion”? Do the increasing number of OBCs who are making it to competitive examinations, to medical and engineering colleges in the general category testify to that? Even the most fervent activist has not yet excavated evidence to establish that marks are given on the basis of a man’s creed, colour and religion! And yet, the Court, having writ...

The very Court that we encountered giving lectures on induction/deduction.

The very Court that was reminding us, “to prove a fact, inference must be drawn on the basis of evidence and circumstances. They must be carefully distinguished from conjectures or speculation. The mind is prone to take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of one connected whole.”

Facts missing, the Court elevates the measure it sets out to approve to higher plane – that of principle!

It is the constitutional imperative of the executive to provide opportunities and facilities to the handicapped to acquire the degree in specialities, super-specialities or technical posts. *Denial thereof is a total denial of right to enjoy equality.* It is well-settled legal position that fundamental rights are to be interpreted broadly to enable the citizens to enjoy the rights

enshrined in Parts III and IV of the Constitution vide *The Ahmedabad St. Xaviers College Society v. State of Gujarat*, MANU/SC/0088/1974; *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College*, MANU/SC/0457/1990 and *Asbok Kumar Gupta v. State of U.P.*, MANU/SC/1176/1997. Under these circumstances, the view of the High Court that the reservations in post graduation specialities or super-specialities are detrimental to the high degree of efficiency and violative of Article 14 is clearly incorrect, erroneous, illegal and unconstitutional. Thus, we hold that the reservation in post graduation speciality or super-speciality is valid under Articles 14, 15(1) and 15 (4) of the Constitution.¹

In a word, you can trust the nine Judges who decided *Indra Sawhney* and who concluded that reserving seats on the basis of birth in specialities and super-specialities will injure the national interest; or you can trust the three Judges who decided *Post-Graduate Institute of Medical Education and Research* and reserve what you will!

I shall revert to the question later whether providing reservations in super-specialities, etc. is an ingredient of equality. For the moment, we need just note that among those who have been most insistent that restricting the ambit of reservations in medical colleges in any way is a denial of equality, are persons – specially in the political sphere – who insist that, because of the high office they have held, the State must pay for their medical treatment in the most expensive hospitals here and abroad, hospitals and doctors to which the poor masses can never even dream of having access! Socialism for the masses! Equality – but for others! Indeed, Gandhiji is turned on his head. He taught that the ones who would speak on behalf of the poor, the ones who would lead the people must be the first to bear sacrifice and privation. He would not prescribe for others what he did not do himself. The logic of our leaders is the exact opposite: precisely because they represent those who have been oppressed for centuries, they maintain, they must get the most expensive treatment and facilities! Looking askance at their snatching such facilities for themselves is an affront to those whom they represent! It is to perpetuate the discrimination, nay oppression of centuries!

¹*Post-Graduate Institute of Medical Education and Research*, op. cit., at 308-09, paras 25-26.

This way to excellence

In cases of the kind we have been following, the Court, as we see, just dismisses the notion that reserving half the seats in a course or a service, and allotting them on the basis not of merit but of birth, will affect efficiency as an “unsubstantiated conjecture.” It dismisses the apprehension in the faith that the reservationists “will eventually make up for their initial handicaps,” etc. Propelled by activist judges, the Court has gone farther. It has reasoned:

- ❑ The Preamble to the Constitution is a part of its Basic Structure;
- ❑ The Preamble speaks of equality;
- ❑ In practice, this means socioeconomic justice, equality of opportunity, equality of status, equality of dignity, equality of political power;
- ❑ Socioeconomic justice entails economic empowerment of the poor;
- ❑ This latter is a Fundamental Right;
- ❑ Reservation of posts under the State is one of the modes to provide socioeconomic justice to the poor, to empower them economically, to ensure them equality of opportunity, status and dignity, to ensure that they have commensurate political power;
- ❑ This mode will be rendered ineffective if reservation is confined to lower posts – because power, status, dignity reside in the upper echelons;
- ❑ Furthermore, reserving higher posts for the downtrodden is the way “to enable the Dalits and Tribes-employees to improve excellence in higher echelons of service.”

The way concepts are deliberately confounded by the progressives speaks to their determination, to put it no lower! In a typical passage we read, “Equality of status and dignity of the individual will be secured when the employees belonging to Dalits and Tribes are given an opportunity of *appointment by promotion* in higher echelons of service so that they will have opportunity to strive towards excellence individually and collectively with other employees in improving the efficiency of administration. Equally they get the opportunity to improve their efficiency and opportunity to hold offices of responsibility at hierarchical levels.”¹ Notice how “appointment” and “promotion”, “opportunity” and outcome, “status

¹*Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, at page 225, para 26.

and dignity" and efficiency of administration are all collapsed into one another! But who may question the committed?

As for efficiency of administration and the limitation placed by Article 335, and the duty to pursue and ensure excellence, they vault over these, *a la* V.P. Singh, by redefining excellence and efficiency. They reason that, indeed, efficiency of administration must be kept in mind, but

- ❑ The administrative structure will be efficient only when it fulfils the needs and aspirations of the downtrodden;
- ❑ It will be disposed to do so only when the downtrodden have adequate representation in it;
- ❑ Indeed, as sharing power is an aspiration in itself, the system will be imbued with merit, it will be "excellent" only when it has empowered the downtrodden;
- ❑ Moreover, as power rests in the upper reaches of administration, the system would not have been just by the downtrodden till they have been accorded sufficient representation in those upper echelons of the administrative services.

There is also the twofold mandate that the Constitution imposes on each individual, these judges have argued, standing Article 51A on its head. He must strive for excellence. Second, he must do everything he can to enable the country to attain excellence. These duties apply as much to members of Scheduled Castes and Tribes and Other Backward Classes as to anyone else. It follows that the system must create the conditions in which members of SCs/STs/OBCs can both attain excellence themselves as well as enable the country to attain ever higher levels of achievement. The *sine qua non* for their living up to the direction of the Constitution is to get into colleges, into services. But even this will not be enough. As they will not be able to attain their full potential until they occupy the higher posts, and as they will not be able to get into those higher posts unless these are reserved for them, the system must reserve those posts for them by excluding others. As they will not be able to contribute to the country attaining excellence until they occupy the seats in which real power resides, the system must enable them to acquire those seats. Hence, reservations in post-graduate as well as under-graduate courses; reservations at entry as well as in promotions; reservations in all services! And now in the private sector as much as the government.

Q.E.D.

Timorousness compounded by Principle!

Now, a judge can take Article 335, and maintain,

The Government *must* take into account the *claims* of SCs/STs as ensuring real equality is a fundamental duty of the State, of course bearing in mind that efficiency of administration does not suffer.

Or he can maintain,

While taking into account the claims of SCs/STs, Government *must* bear in mind the effects on efficiency of administration as this is of paramount importance...

And then there are judgments in which the judge deciding with a later case can pick up one passage or the other from an earlier judgment – the more prolix the judge who wrote the original judgment, the more helpful he is in this regard. All the more so because of the mode of argument in many a court – that of headnote jurisprudence, so to say. And then there are judgments in which each sentence qualifies the previous one. In *Ram Bhagat Singh v. State of Haryana*, the Supreme Court reiterates that equality can only be among equals, that, therefore, “where unequals are competing, conditions must be created by relaxation or otherwise so that unequals compete in terms of equality with respect of jobs and employment of the State.” It adds,

Those groups or segments of society which are by reasons of history or otherwise unable to compete in terms of absolute equality with the members of other communities or groups in the society, should be ensured and assured chances of competing in terms of equality. They must be helped to compete equally but

And now notice from sentence to sentence,

it is important to emphasise that equality of opportunity is sought to be achieved for the public services or employment. The efficacy and efficiency of that service is of prime consideration.

First one thing,

Equality must be there for all to compete for the public services. Public services and public employment do not exist for providing jobs in terms of equality or otherwise to all. *Public services and public employment must serve only public purpose and anything that hampers or impairs the efficiency or efficacy of public services cannot and should not be permitted in ensuring conditions of constitutional equality.* These should be done objectively, rationally and reasonably.

And next, the other,

As is often said, it may be that need to ensure equality for Scheduled Castes and Scheduled Tribes should not be surrendered on *the facile and value-based perception of efficiency.*

Then, back to the first,

Yet efficiency must be ensured.

Next, back to the second,

Real equality must be accorded.¹

You may conclude what you will. Either that the Court has given sage operational advice; balance the two objectives; or that it has left the matter to be weighed and decided by the Executive; or that it has just swung from one desirable to the other, leaving the matter in the air.

But there is a much larger problem. The moral high-ground has been wrested by casteists in public discourse and by their counterparts in the judiciary – the progressives who, looking at the “reality” of India as it is, have concluded that here “caste is class”. As a result, when it has to take a decision that goes against reservations, the judiciary, even at the best of times, is timorous and defensive. A telling, and typical example can be gleaned from a case concerning the judiciary itself.

¹*Ram Bhagat Singh v. State of Haryana*, (1997) 11 SCC 417, at 420, para 4.

Timorous in any case

Most of us think, "At least, the judiciary has been saved from caste-based reservations." That is because we do not know the real state of affairs. The High Court of Patna was already reserving 14 per cent of posts in the lower judiciary for Scheduled Castes and another ten per cent for Scheduled Tribes. In 1991, the Bihar Government issued an Ordinance reserving 50 per cent of these seats for SC/ST/OBC functionaries. Soon enough, the legislature confirmed the reservation by converting the Ordinance into an Act. The Act was challenged. Eventually, the case came to the Supreme Court.

The Supreme Court struck down the Act. The ground on which it did so, and the apologia it offered while doing so tell the tale.

Appointments to the lower judiciary are to be made by the Governor in consultation with the High Court of the state, the Supreme Court noted. This consultation must be effective. Indeed, the view of the High Court about an individual candidate must take precedence, and only when he has over-riding evidence to the contrary must the Governor depart from the advice of the High Court in this regard. Hence, the Court ruled, to attempt to set apart posts by passing an Act was wrong. If necessary, the Governor and the High Court could have brought about the fair representation for the concerned classes through mutual consultation.

Even that may not have been necessary, the Court said, as the High Court, being a high constitutional authority, is itself conscious of its social obligations. It is already, and without a formal law directing it to do so, ensuring 24 per cent reservations for SCs and STs. If the Governor had come to the conclusion that another lot must be reserved for OBCs, he could have brought that result about by persuading the High Court which, as noted, is in any case alive to its social obligations. "It is easy to visualize," the Supreme Court said, "that the High Court may, on being properly and effectively consulted, endorse the Governor's view to enact provision of reservation and lay down the percentage of reservation in Judicial Service, for which it will be the appropriate authority to suggest appropriate measures and the required percentage of reservation, keeping in view the thrust of Article 335 which requires the

consideration of the claim of members of SC, ST and OBC for reservation in Services to be consistent with the maintenance of efficiency of administration." Indeed, the Court was pained that some doubted the commitment of the judiciary in this regard. It said,

We really fail to understand as to why the legislature would feel that the Governor, when he frames rules in consultation with the High Court and the Public Service Commission under Article 234 will not take into consideration the constitutional mandate under Article 16(1) or Article 16(4). In fact, in the case in hand in the Bihar Judicial Service Recruitment Rules, 1955, reservations have been provided for Scheduled Caste and Scheduled Tribe candidates and the Full Court of Patna High Court have also adopted the percentage of reservation for these candidates as per the notification of the State Government. So far as the Superior Judicial Service is concerned, it is of course true that there has been no provision for reservation. But such provision could always be made by the Governor in consultation with the High Court, also bearing in mind the mandate of Article 335, namely Maintenance of Efficiency of Administration. *It is indeed painful to notice, some times law makers unnecessarily feel that the High Court or the Judges constituting the High Court are totally oblivious to the Constitutional mandate underlying Article 16 and, more particularly, Article 16(4).* It is also not appropriate to think that the High Court will not take into consideration the provisions of Article 16(1) and 16(4) while considering the case of recruitment to the judicial services of the State. The Judiciary is one of the three limbs of the Constitution and those who are entrusted with the affairs of administration of justice must be presumed to have greater expertise in understanding the Constitutional requirements.¹

Of course, in the end the judiciary can only delay the slide downhill a bit. As we have seen, time and again the Executive and Legislature have overturned judgments of the Supreme Court by changing not just the laws but the Constitution itself. But I am on the defensiveness with which the courts view even the tentative brake that they decree.

Not the candidates, but the criteria are on test!

From this only one step further is required: by how much may standards be diluted? Even when the Supreme Court is confronted

¹ *State of Bihar v. Bal Mukund Sah*, (2000) 4 SCC 640, at 725, para 67.

with a case of recruitment to the judiciary itself, it in effect urges that the standards prescribed be lowered *sufficiently*. And what is the test of sufficiency? That the reservationists actually get recruited. Here is how it puts the matter in *Ram Bhagat Singh v. State of Haryana*:

We are conscious that high efficiency is required because the recruitment is in the judicial branch, that is to say, for prospective judicial officers who will be in charge of administration of justice in the country. But at the same time, if possible, in order to ensure that there is equality of opportunity, a percentage [the score to be attained to qualify for the post] should be fixed without, in any way, compromising with the efficiency required for the job *which will be attainable by backward communities*, that is to say, Scheduled Castes and Scheduled Tribes. Unless such a percentage is fixed on the aforesaid basis and a percentage is fixed for qualification which would normally be unattainable by the Scheduled Castes and Scheduled Tribes determined on an objective basis, it would not be possible to ensure equality of opportunity.¹

Notice the steps:

- ☐ Efficiency is of course vital;
- ☐ So, there must be standards;
- ☐ But these standards must be such that the reservationists can attain them;
- ☐ They can be said to have been correctly fixed only if they actually lead to the recruitment of the reservationists;
- ☐ Otherwise, equal opportunity would not have been afforded.

In this case, the Court at least left the fixation of standards to the Government. Acting on the same touchstone, namely, that the relaxations must be of such an order that they actually result in the recruitment of the requisite number of reservationists, in *Comptroller and Auditor General*, the Supreme Court struck down the standard that had been fixed and declared the relaxation that the CAG had prescribed for reservationists to have been “a purely illusory one”. It decreed relaxations that were almost twelve times what the authority which had to discharge the responsibilities had thought permissible, and issued a mandamus to Government directing it to add 25 marks to the scores of candidates from Scheduled Castes and

¹ *Ram Bhagat Singh v. State of Haryana*, (1997) 11 SCC 417, at 420, para 5.

Tribes.¹ Fortunately, this particular decision has been over-ruled by subsequent verdicts.²

The way to read the Constitution

The proper role of judges

For it is not just in regard to reservations that the progressive judges have overawed others; it is not just in regard to reservations that the moderate judges have been overawed by what has become the norm in public discourse. The progressives, both in the judiciary and outside, have successfully drilled two basic assertions into the judicial consciousness – about how we must read the Constitution, and what the proper role is for the judiciary.

When they want to, of course, our judges are as determined to stick to precedent as those of any other country – in instance after instance, the whole “reasoning” consists of morsels from earlier judgments: in these rulings, our courts are ever so deferential to precedent. But when they set out to advance a cause that they have selected, the judges do not let either precedents or even the manifest meaning of the words that the Constitution uses, come in the way.

The Constitution is a dynamic document, they say at such times. It is a living organism. Precedent cannot be allowed to become a straitjacket, they say.

Typical of these perorations are those of Justice V.R. Krishna Iyer. As we have seen, the Railways had decreed reservations at the entrance level as well as in promotions; the latter were to apply to both selection and non-selection posts; reservations were to be not just 50 per cent but 66⅔ per cent of the posts and vacancies; members of Scheduled Castes and Tribes were to be deemed to have secured a grade higher than they had obtained in their assessments; the seats and posts that could not be filled by the reservationists in a year would be carried over for three years; and so on. The matter had come in appeal to the Supreme Court. We have seen how Justices Krishna

¹*Comptroller and Auditor General of India v. K.S. Jagannathan*, (1986) 2 SCC 679.

²See, for instance, *Ajit Singh v. State of Punjab (II)*, (1999) 7 SCC 209, in which a five Judge Bench held that Article 16(4) is an enabling provision that merely confers a discretion on the Executive to reserve some posts. It does not impose a duty on the State, nor does it confer a right on individuals. “Affirmative action stops where reverse discrimination begins,” the Court says in this important case.

Iyer and Chinnappa Reddy gave their seal of approval, and the lengths they had to go to do so. In effect, as we shall notice in a moment, two judges used this case to over-rule what five judges had held in *Devadasan*.¹

How did they justify all this? "We, as Judges dealing with a socially charged issue of constitutional law, must never forget that the Indian Constitution is a National Charter pregnant with *social revolution*, not a Legal Parchment barren of *militant values* to usher in a democratic, secular, socialist society which belongs equally to the masses including the *barijan-girijan* millions hungering for a humane deal after feudal-colonial history's long night," Justice Krishna Iyer wrote in explanation.

"These forces nurtured the roots of our constitutional values among which must be found the fighting faith in a casteless society, not by obliterating the label but by advancement of the backward, particularly that pathetic segment described colourlessly as Scheduled Castes and Scheduled Tribes," he continued. "To recognise these poignant realities of social history and so to interpret the Constitution as to fulfill itself, not eruditely to undermine its substance through the tyranny of literality, is the task of judicial patriotism so relevant in Third World conditions to make liberation a living fact." In a word, anyone voicing anything to the contrary is ensnared in "the tyranny of literality", he is lacking in "judicial patriotism", he is shutting his eyes to "the poignant realities of social history."

"We could not apprehend the social dimension of the stark squalor of SC & ST by viewing Article 16(4) through a narrow legal aperture but only by an aperçu of the broader demands of social democracy, without which the Republic would cease to be a reality to one-fifth of Indian humanity," Justice Krishna Iyer declaimed.

"Our Constitution is a dynamic document with *destination social revolution*," he maintained. "It is not anaemic nor neutral but *vigorously purposeful* and *value-laden* as the very descriptive adjectives of our Republic proclaim. Where ancient social injustice freezes the 'genial current of the soul' for whole human segments our Constitution is not non-aligned. *Activist equalisation*, as a realistic

¹See, Parmanand Singh, "Perspectives on *Sosbit Sangh*," *SCC Journal*, (1982) 1 SCC(Jour) 37.

strategy of producing human equality, is not legal anathema for Articles 14 and 16. To hold otherwise is *constitutional obscurantism and legal literalism, allergic to sociologically intelligent interpretation*." Again, anyone holding a contrary opinion about the issue at hand or about the content and nature of the Constitution is prisoner of "constitutional obscurantism and legal literalism"; he is caught in sociologically *unintelligent* interpretation!

"Constitutional questions cannot be viewed in vacua," the Judge admonished, "but must be answered in the social milieu which gives it living meaning. After all, the world of facts enlivens the world of words. And logomachy is not law but a fatal, though fascinating, futility if alienated from the facts of life." The colleague who adheres to what the Constitution actually specifies, in other words, is mired in "logomachy", he is deciding things "in vacuo", he has departed from "law" and fallen into a "fatal futility"!

"A constitutional instrument is *sui generis* and, obviously and necessarily, its interpretation cannot always run on the same lines as the interpretation of statutes made in exercise of the powers conferred by it," the Judge continues. "A Constitution, like ours, born of an anti-imperialist struggle, influenced by constitutional instruments, events and revolutions elsewhere, in search of a better world and wedded to the idea of justice, economic, social and political, to all, must receive a generous interpretation so as to give all its citizens the full measure of justice so proclaimed instead of 'the austerity of tabulated legalism.' And so, when the constitutional instrument to be expounded is a Constitution like the Indian Constitution, *the expositors are to concern themselves not with words and mere words only, but, as much, with the philosophy or what we may call 'the spirit and the sense' of the Constitution*." And the Judge is in doubt about what "the spirit and sense" are: "Here, we do not have to venture upon a voyage of discovery to find the spirit and the sense of the Constitution; we do not have to look to any extraneous sources for inspiration and guidance; they may be sought and found in the Preamble to the Constitution, in the directive principles of State policy, and other such provisions." Not in the Articles themselves, as in this penumbra!¹

¹*Akhil Bharatiya Soshit Karamchhari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246; at 258, 260, 263, 308; in particular paras 11, 14, 15, 20, 24, 122.

The activist judges have little difficulty in finding a few lines from a previous judgment when they can be yoked to advance the cause they have determined to advance through the case in hand. And they have as little difficulty in "differentiating" the case at hand from the case in which the Court itself had given a judgment that comes in the way of what they want to advance through the case at hand.

In *Indra Sawhney*, the judgment spelt out that reserving seats in specialities and super-specialities would in the end harm every one: the consequence of a botched brain operation will not be less severe for a low-caste man than for a high-caste man. But the activist judge has no difficulty in vaulting over this dictum. First, as we have seen, he confounds subjects with degrees: in *Indra Sawhney*, the Court said there should be no reservations in specialities; but the question before us is courses. Hence, those observations do not apply. Second, even while making those observations, the Court had left the matter to be decided by the Executive. Hence, those observations are not a bar. As this "differentiating" is manifestly insufficient, the Judge reverts to the old weapon: he casts doubt on the criterion itself by which merit is sought to be adjudged, without, as is always the case, specifying ways by which those criteria and methods of assessment may be improved. "We are unable to appreciate the argument of detriment to the interests of society," he declares. "As we have said hereinbefore, there is no distinction in the matter of passing the examination. No one will be passed unless he acquires the requisite level of proficiency. Secondly, the academic performance is no guarantee of efficiency in practice. We have seen both in law and medicine that persons with brilliant academic record do not succeed in practice while students who were supposed to be less intelligent come out successful in profession/practice. It is, therefore, wrong to presume that a doctor with good academic record is bound to prove a better doctor in practice. It may happen or may not." Therefore, it will not! Q.E.D.¹

Similarly, in *Indra Sawhney*, the Supreme Court decided that there shall be no reservations in promotions. Once again, the activist judge has no difficulty in brushing that aside. In *Indra Sawhney*, the Court decided a "non-issue", he says:

¹*Ajay Kumar Singh v. State of Bihar*, (1994) 4 SCC 401, at 409, para 9.

In Mandal's case, admittedly, the two Government Memorandums provided for reservation to OBCs in initial direct recruitment in central services. The question of reservation in promotion was a non-issue as conceded in that case itself and across the bar; but the learned judges, with all due respect and deference to their learned view, decided a non-issue, though objected to, on the ground that counsel appearing for the parties had put their heads together and framed the issue and reference was made to a larger Bench so that the issue was decided on that premise though it is settled constitutional law that constitutional issues cannot be decided unless the issue directly arises for decision, with due respect the Bench decided a non-issue on a constitutional law affecting 22% of the national population... It is an admitted case that as there was no issue, nor was any evidence adduced to prove whether efficiency of administration was deteriorated [sic.] due to reservation in promotion; nor was it pointed out from the facts of any case...¹

The fact is that in *Indra Sawhney*, this point had been urged by the then Attorney General on behalf of the Government – that, as the Order which was under challenge did not prescribe reservations in promotions, the question did not arise in the case. It had been considered by the nine judges. Eight of them, after due deliberation, had pronounced on it, and they had given reasons for doing so. True, the Order does not prescribe reservations in promotions, the Judges said, "But it must be remembered that the reference to this larger Bench was made with a view to 'finally settle the legal position relating to reservations'. The idea was to have a final look at the said question by a larger Bench to settle the law in an authoritative way. It is for this reason that we have been persuaded to express ourselves on this question..." And again, "Whether reservation can be made also at the time of promotion to a higher post does not directly arise from the impugned Orders, it is too vital an aspect of the concept of reservation under Article 16(4) to be overlooked...."² And here we have a single Judge declare that what the eight judges did was to pronounce on a non-issue, and, therefore, by implication, what they held ought to be disregarded.

But to proceed. One must not just go by the *words* of the Constitution, the activist judges say. "The Indian Constitution is a

¹ *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, at 230, para 32.

² *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 456, 741, paras 300, 820-21.

great social document," Justice V.R. Krishna Iyer declares in another case, "almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy. Its provisions can be comprehended only by a spacious, social-science approach, not by pedantic, traditional legalism..."¹

Grandiloquence is as much a part of activism as hyperbole. Such activist constructions of the Constitution and of what the role of the judiciary must be under it are leavened by both. "Equality of status and of opportunity...' the *rubric chiselled* in the *luminous* Preamble of our *vibrating* and *pulsating* Constitution *radiates* one of the avowed objectives in our Sovereign, Socialist and Secular Democratic Republic..." Justice Pandian begins. "Our Constitution is *unquestionably unique* in its character and assimilation having its notable aspirations contained in 'Fundamental Rights' (in Part III) through which the illumination of Constitutional rights comes to us *not through an artless window glass but refracted with the enhanced intensity and beauty by prismatic interpretation* of the Constitutional provisions dealing with equal distribution of justice in the social, political and economic spheres," he avers. "Though forty-five years from the commencement of the Indian independence after the end of British paramountcy and forty-two years from the advent of our Constitution have marched on, the *tormenting enigma* that often nags the people of India is whether the principle of 'equality of status and of opportunity' to be equally provided to all the citizens of our country *from cradle to grave* is satisfactorily consummated and whether the clarion of 'equality of opportunity in matters of public employment' enshrined in Article 16(4) of the Constitution of India has been called into action? *With a broken heart one has to answer these questions in the negative...*" "The Founding Fathers of our Constitution have designedly couched Articles 14, 15 and 16 in *comprehensive phraseology* so that the *frail and emaciated section of the people living in poverty, rearing in obscurity, possessing no wealth or influence, having no education, much less higher education and suffering from social repression and oppression* should not be denied of equality..." "The *undignified social status and sub-human living conditions* leave an *indelible impression* that their *forlorn* hopes for

¹State of Kerala v. N.M. Thomas, (1976) 2 SCC 310, at 355, para 106.

equality in every sphere of life are only a myth rather than a reality... this *appalling* situation and the *pathetic* condition of the backward classes..."¹

Magniloquent words justify big-hearted interpretation!

Others have cautioned that once the reins are let go in this fashion, the Constitution will be pushed and pulled any which way, that it will be made to say whatever the particular Bench wants it to say; that the approach will do great injury to judicial discipline and, therefore, to the predictability of law. In *N.M Thomas* itself, Justice H.R. Khanna pointed to the dangers, and, seeing the way entire edifices were being constructed on words of some foreign academic or what some American judge had said in some judgment that was delivered in a very different context, counselled that judges should not go by stray quotations from this thinker or that, howsoever eminent they may be: "If one eminent thinker supports one view," he says, "support for the opposite view can be found in the writings of another equally eminent thinker. Whatever indeed may be the conclusion, arguments not lacking in logic can be found in support of such conclusion." In as gentle a way as possible, he counselled against what was happening in the Court, and urged that the Court avoid a doctrinaire approach. "A Constitution is the vehicle of the life of a nation and deals with practical problems of the Government. It is, therefore, imperative that the approach to be adopted by the courts while construing the provisions of the Constitution should be pragmatic and not one as a result of which the court is likely to get lost in a maze of abstract theories." In particular, he said, while construing provisions of the Constitution one imperative "is to foresee as to what would be the impact of that construction not merely on the case in hand but also on future cases which may arise under those provisions. Out of our concern for the facts of one individual case we must not adopt a construction the effect of which might be to open the door for making all kinds of inroads into a great ideal and desideratum like that of equality of opportunity. Likewise, we should avoid, in the absence of compelling reason, a course that has the effect of unsettling a constitutional position which has been settled over a long term of years by a series of decisions."²

¹*Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 361-62, paras 3, 4.

²*State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 398-99, paras 213-14.

But the activists will have none of this. We are advancing a revolution, they declare. These constitutional positions have to be overturned precisely because they have remained settled for that long term of years. Convinced that they are the standard bearers of revolution, that they are transforming this medieval, traditional, hierarchical society into a modern, egalitarian democracy, they strain to outdo what preceding revolutionaries have held.

Not words; not even generous constructions put on words; but to elongate further the direction in which the constructions have tended!

One must not even go merely by the liberal constructions of the words of the Constitution in particular cases, they say. One must in addition take account of the *direction in which the meaning that is being read into the words is being extended*. "In the interpretation of the Constitution," the Supreme Court tells us in *Ashok Kumar Gupta*, "words of width are both a framework of concepts and means to achieve the goals in the Preamble. Concepts may keep changing to expand and elongate the rights. Constitutional issues are not solved by mere appeal to the meaning of the words without *an acceptance of the line of their growth*. The intention of the Constitution is, rather to outline principles than to engrave details."¹

The judge as revolutionist

With this goes the premise that the judge must be an activist and more, a premise that is proclaimed with much grandiloquence. As the Court goes on to declare in the same judgment:

The judge must be attune with the spirit of his/her times... The great tides and currents which engulf the rest of the men do not turn aside in their course and pass the judges idly by. Law should subserve social purpose. Judge must be a jurist endowed with the legislator's wisdom, historian's search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future and to decide objectively disengaging himself/herself from every personal influence or predilections. Therefore, *the judges should adopt purposive interpretation of the dynamic concepts of the Constitution* and the Act with its interpretative armoury to articulate the felt necessities of the time. The judge must also bear in mind that *social legislation is not a document for*

¹*Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, at 242, para 47.

fastidious dialects but a means of ordering the life of the people. To construe law one must enter into its spirit, its setting and history. Law should be capable of expanding freedoms of the people and the legal order can, weighed with utmost equal care, be made to provide the underpinning of the highly inequitable social order. The power of judicial review must, therefore, be exercised with insight into social values to supplement the changing social needs. *The existing social inequalities or imbalances are to be removed and social order readjusted through rule of law*, lest the force of violent cult gain ugly triumph. Judges are summoned to the duty of shaping the progress of the law to consolidate society and grant access to the Dalits and Tribes to public means or places dedicated to public use or places of amenities open to public etc. *The law which is the resultant product is not found but made.*¹

"A purposive interpretation of the dynamic concepts of the Constitution," "Social legislation is not a document for fastidious dialects [*sic*] but a means of ordering the life of the people," "The existing social inequalities or imbalances are to be removed and social order readjusted through rule of law," a judiciary that does not just "find law" but *makes* it. Banners upon banners. And this is but a representative judgment in this regard.

The Court proceeds to pile further adjectives on to this activism. It declares,

The Judges, therefore, should respond to the human situations to meet the felt necessities of the time and social needs; make meaningful the right to life and give effect to the Constitution and the will of the legislature. This Court *as the vehicle of transforming the nation's life* should respond to the nation's needs, interpret the law with pragmatism to further public welfare to make the constitutional animations a reality and interpret the Constitution broadly and liberally enabling the citizens to enjoy the rights...

Therefore, it is but the duty of the Court *to supply vitality, blood and flesh*, to balance the competing rights *by interpreting the principles* to the language or the words contained in the living and organic Constitution, *broadly and liberally*. The judicial function of the Court, thereby, is *to build up*, by judicial statesmanship and judicial review, *smooth social change* under rule of law with a continuity of the past to meet the dominant needs and aspirations of the present. This Court, as sentinel on the *qui vive*,

¹*Ibid*, at 242, para 47.

has been invested with more freedom, in the interpretation of the Constitution than in the interpretation of other laws. This Court, therefore, is not bound to accept an interpretation which retards the progress or impedes social integration; it adopts such interpretation which would bring about the ideals set down in the Preamble of the Constitution aided by Parts III and IV – a truism meaningful and a living reality to all sections of the society as a whole by making available the rights to social justice and economic empowerment to the weaker sections, and by preventing injustice to them. Protective discrimination is an armour to realise distributive justice...¹

Such clarion calls are *de rigueur* in the reservations' judgments. "The Indian Constitution was described as a document of social revolution which casts an obligation on every instrumentality including the judiciary which is a separate but equal branch of the State to transform the *status quo ante* into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all," the Supreme Court declares in *State of Bihar v. Bal Mukand Sab*. "The British concept of justicing was found to be satisfactory for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice between chronic unequals. In the words of Granville Austin, the judiciary has to *become an arm of the socio-economic revolution* and perform an active role calculated to bring social justice within the reach of the common man."²

Selective activism

But then, one must not be dynamic and generous and "functionally involved" in every case! Remember the ringing words of Justice Krishna Iyer about how the Court would rush to scotch arbitrariness, to undo injustice? Remember how judges like him would not be deterred by considerations of mere procedure in reaching out – both to check the Executive and to bring succor to the individual? Remember how judges like him have shrunk the ambit of "policy" to

¹*Ibid*, at 244, paras 48-51.

²*State of Bihar v. Bal Mukund Sab*, (2000) 4 SCC 640, at 727, para 76. In this, the judges were literally echoing the bugle Justice P.N. Bhāgwati had sounded in the infamous *Transfer of Judges* case – right up to that line from Granville Austin!

pronounce on matters? Is it then not a bit of a surprise to read in *Sosbit Karamchhari Sangh* the same Judge hold, that though "one may easily sympathise with" those who suffer from the measure in question, for "They are many in number in the lower stations of life. They are economically backward and burdened with the drudgery of life...", but as the Constitution has cast its preference for the socially backward, "*Who are we, as judges to question the wisdom of provisions made by Government within the parameters of Article 16(4)?*" The answer is obvious that the writ of the court cannot quash what is not contrary to the Constitution however tearful the consequences for those who may be adversely affected."

Of course, he does express hope about what may be done in the eventual future: "The progressive trend must, of course, be to classify on the have-not basis but the SC/ST category is, generally speaking, not only deplorably poor but also humiliatingly *pariah* in their lot." But this time round, as we have noticed, he is self-denial personified: "We are not concerned with that dubious brand...;" yes, in the long run, the remedy is to liquidate handicaps through constructive projects, however, "All this is in another street and we need not walk that way now."¹

Of course, other facts, equally insistent in the demand they make for intervention, stare at the Court. But the Judge will not be deflected. "True, the politicisation of casteism, its infiltration into unsuspected human territories and the injection of caste-consciousness in schools and colleges via backward class reservation are a canker in the rose of secularism," he allows. "More positive measures of levelling up by constructive strategies may be the developmental need. But the judicial process while considering constitutional questions, must keep politics and administrative alternatives as out of bounds except to the extent economics, sociology and other disciplines bear scientifically upon the proposition demanding court pronouncement..."

The very Judge who has been delivering orations on how the judiciary must be an arm of social revolution, *a la Theses on Feurbach*, now says "Whether alternative policies should have been chosen

¹*Akshil Bharatiya Sosbit Karamchhari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 297, para 92.

by the Government or would have served better to remove the handicaps of the SCs & STs, whether the advantages conferred on these classes are too generous and overly compassionate and whether the considerable numbers of the economically destitute receive the same sympathy as social have-nots categorised as SC & ST – these and other speculative maybes, are beyond the court's orbit save where Article 16 is hit by these omissions and commissions." And, of course, far from it for the Court to question the "ultra concern that the Constitution makers displayed for Scheduled Castes and Tribes. We must remember, after all, "The court functions under the Constitution, not over it, interprets the Constitution, not amends it, implements its provisions, not dilutes it through personal philosophy projected as constitutional construction..."

Hence, the self-denial: "Objective tuned to constitutional wavelengths is our function and if – only if – constitutional guarantees have clearly been violated will the court declare as *non est* such governmental projects as go beyond the mandates of Part III read in harmony with Part IV. If, on a reasonable construction, the Administration's special provisions under Article 16(4) exceed constitutional limits, it is the duty of the court to strike dead such project."

But then the caveat for future activism: "Even so, while viewing the legal issues we must not forget what is elementary that law cannot go it alone but must function as a member of the sociological ensemble of disciplines."¹

Recall Justice Krishna Iyer's ringing orations on Article 335 and the imperative of maintaining efficiency in administration. And in this case? The shrug-cum-caricature we have already encountered: *barijan-girijans* are a microscopic percentage of the services; they could not be affecting the overall efficiency of administration... Hence, the arguments about efficiency and inefficiency are "trite" and "a trifle phoney".

Indeed, only those whose personal interests are affected by reservations rake up such miasmas. After all, even though standards have been falling, the world has continued to go forward. As for the

¹*Akshil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 262-63, paras 18, 19.

better-off stealing benefits, in one case, Justice Krishna Iyer is full of dire warning – the double injury these better-off do; in this one, he declares that he is not moved by the prospect: the plea is a “specious” one, he says; “A swallow does not make a summer,” he says; may be the Executive would want to attend to this at some future date...¹

How telling, in view of this self-denial, is the warning that Justice Krishna Iyer himself gives in this very case: reservations must not be allowed to become a “super-fundamental right”, he warns; to lend the reservations policy an “immortality” is to defeat its very purpose and rationale; furthermore, “to politicise this provision for communal support and Party ends is to subvert the solemn undertaking of Article 16(1), to casteify ‘reservation’ even beyond the dismal groups of backwardmost people, euphemistically described as SC & ST, is to run a grave constitutional risk. Caste, *ipso facto*, is not class in a secular State...”

Every word in that warning chastises what the Judge is approving in his judgment!²

Two points arise. The first concerns the way a judge tilts towards one proposition in one case and its opposite in another, the ease with which what is a mandatory and imperative in one case becomes a “trite” and “phoney” contrivance in another. Second, judges following later can use either one tilt or its opposite to buttress *their* predisposition in the case that has been brought before them.

¹*Ibid.*, at 297, paras 93, 94.

²The reader who is distracted by the grandiloquence, may want to read the judgment from the beginning: “*The Root Thought*: ‘The abolition of slavery has gone on for a long time. Rome abolished slavery, America abolished it, and we did, but only the words were abolished, not the thing.’ (Leo N. Tolstoy) This agonising gap between hortative hopes and human dupes *vis-à-vis* that serf-like sector of Indian society, strangely described as Scheduled Castes and Scheduled Tribes (SCs & STs, for short), and the administrative exercises to bridge this big hiatus by processes like reservations and other concessions in the field of public employment, is the broad issue that demands constitutional examination in the Indian setting of competitive equality before the law and tearful inequality in life. A fasciculus of directions of the Railway Board has been attacked as *ultra vires* and the court has to pronounce on it, not philosophically but pragmatically. ‘The philosophers have only interpreted the world in various ways; the point is to change it’ (*Theses on Feuerbach*, 1888, xi) – this was the founding fathers’ fighting faith and serves as perspective-setter for the judicial censor...” [*Ibid.*, paras 1, 2.]

Sosbit Karamchari Sangh is notable for two other reasons also. Since *Balaji* and *Devadasan*, as we have noticed, the Court had been holding that not more than 50 per cent of seats and posts may be reserved. In *Devadasan*, the Court had actually struck down the carry-forward rule as it resulted in reserving more than 50 per cent in individual years. In *Sosbit Karamchari Sangh*, the Court had no difficulty in getting around that limit, and in assuring itself that it was conforming to the reasoning and method and indeed the conclusion of the previous judgements – even as it inserted an indefinite, stretchable word into the limit! What shall count is not the intake in a given year, but the proportion that the reservationists have in the total cadre, it ruled. And in that too, the proportion should not be *substantially* in excess of 50 per cent..., and the 66⅔ per cent reservations which had been decreed and were under challenge were not *considerably in excess of 50 per cent...*¹

There is another telling fact about *Sosbit Karamchari Sangh*. This case was before a three-judge bench. Two judges – Justices Krishna Iyer and Chinnappa Reddy – declared themselves for the propositions recalled above. The third judge – Justice R.S. Pathak – filed a dissent. The result? Two judges over-ruled what five judges had held in *Devadasan*! And who may question them? After all, the five were just interpreting the world in various ways, the point is to change it!

Yet in this very case, this very Judge rejects the plea for reconsideration of *Rangachari*. Now, it is entirely possible that a judge may agree with one case and find another to have been wrongly decided – and accordingly follow the former and overturn the latter. And Justice Krishna Iyer does say that *Rangachari* has his “full concurrence”. But I am on the other reasons he gives for not reconsidering the case. *Rangachari* has been approvingly referred to by the Court for two decades, he says, and been acted upon by the Government. Was that not just as true of *Devadasan*? Indeed, it had held the field longer. We should not open this “Pandora’s box”, says Justice Krishna Iyer, the very Judge who ever so often has proclaimed his determination to recast the spectacles through which the Constitution is interpreted. And, as was his wont, the Judge elevates his preference in regard to this particular case – *Rangachari* –

¹*Ibid*, at 296, para 88.

to a principle. "Constitutional propositions on which a whole nation directs its destiny," the Judge declaims, "are not like Olympic records to be periodically challenged and broken by fresh exercises in excellence but solemn sanctions, with judicial seal set thereon, for the country to navigate towards the haven of human development for everyone. To play crossword puzzle with constitutional construction is to profane it, unless, of course, a serious set-back to the progress of human rights or surprise reversal of constitutional fundamentals has happened."¹

I suppose, the caveat in the last few words, "unless, of course,..." is what provides the flexibility to do one thing in one case and its opposite in another.

The ultimate argument

And at each step there is always the ultimate justification – that, if that activist extension is not accepted, there would be hell to pay. "An *aware* mass of humanity, denied justice for generations, will not take it lying down too long but may explode into Dalit Panthers, as did the Black Panthers in another country," Justice Krishna Iyer warns. Hence, "The case for social equality and economic balance, in terms of employment under the State, cries for more energised administrative effort and a Government that fails to repair this depressed lot, fools the public on *harijan* welfare." Therefore, "Jurists must listen to real life and, theory apart, must be alert enough to read the writing on the wall! Where the rule of law bars the doors of collective justice, the crushed class will seek hope in the streets. The architects of our Constitution were not unfamiliar with direct action where basic justice was long withheld and conceived of 'equal opportunity' as inclusive of equalising opportunity. Only a clinical study of organic law will yield correct diagnostic results" – whatever that means.

By stoking expectations beyond what could be fulfilled, by making these stirring perorations and then leaving it to the Executive to somehow "strike a balance" between what they have led people to expect as their right and what is required for running an efficient administration, are these judges not themselves making such a reaction more likely?

¹*Ibid*, at 276, para 51.

But such considerations cannot slow down an activist judge out to use the Constitution as an instrument of social revolution. Even as he declares that "judicial independence has one dimension, not fully realised by some friends of freedom. Threats of mob hysteria shall not deflect the court from its true accountability to the Constitution, its spirit and text belighted by all the sanctioned materials," Justice Krishna Iyer invokes Dr. Ambedkar's "tearing down the Republic" warning. Political liberty cannot exist until it is accompanied by economic and social liberty, Ambedkar had said in his concluding address to the Constituent Assembly. And had declared that we utterly lack the latter two. "How long shall we continue to live this life of contradictions?" Ambedkar asked. "How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril." Justice Krishna Iyer italicizes the words that followed: "*We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.*"¹

Given that ultimate argument – this, or violent overthrow – the Judge's prescription for the judiciary itself is a natural lemma: "Social engineering – which is law in action – must adopt new strategies to liquidate encrusted group injustices or surrender society to traumatic tensions. Equilibrium, in human terms, emerges from release of the handicapped and the primitive from persistent social disadvantage, by determined, creative and canny legal maneuvers of the State, not by hortative declaration of arid equality." And there is the BBC broadcast to invoke: "To discriminate positively in favour of the weak may sometimes be promotion of genuine equality before the law' as Anthony Lester argued in his talk in the BBC in 1970 in the series: *What is wrong with the law*. 'One law for the Lion and Ox is oppression'. Or, indeed, as was said of another age by Anatole France: 'The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.'"

Therefore, alliteration, as well as words that give us a glimpse of texts which have inspired all this grandiloquence: "Re-distributive justice to *harijan* humanity insists on effective reforms, designed to

¹*Ibid*, at 261, para 16.

produce equal partnership of the erstwhile 'lowliest and the lost', by State action, informed by short-run and long-run sociologically potent perspective planning and implementation... The domination of a class generates, after a long night of sleep or stupor of the dominated, an angry awakening and protestant resistance and this conflict between *thesis*, i.e. the status quo, and *antithesis* i.e. the hunger for happy equality, propels new forces of *synthesis*, i.e. an equitable constitutional order or just society. Our founding fathers, possessed of spiritual insight and *influenced by the materialist interpretation of history*, forestalled such social pressures and pre-empted such economic upsurges and gave us a trinity of commitments – justice: social, economic and political. The 'equality articles' are part of this scheme. My proposition is, given two alternative understandings of the relevant sub-articles [Article 16(1) and (2)], the Court must so interpret the language as to remove that ugly 'inferiority' complex which has done genetic damage to Indian polity and thereby suppress the malady and advance the remedy, informed by sociology and social anthropology. My touchstone is that functional democracy postulates participation by all sections of the people and fair representation in administration is an index of such participation...."¹

Alas!, the perorations may have won the applause of liberals – our vicarious revolutionaries, but, as we have seen, they have met with little more than scorn from others committed to using the "dynamic Constitution" as a "purposeful instrument". Progressives who have followed other progressives have found their predecessors to have been insufficiently progressive! Several judges whose judgments have stretched the limits, who read ever newer meanings into the plain words of the Constitution justified the stretching by invoking the "preferential principle", by invoking the doctrine of "protective or compensatory discrimination". They must have felt that they were decreeing revolutionary advances for the disadvantaged. To Justice O. Chinnappa Reddy, however, such expressions and the rulings that followed from them smack of superiority, of elitism! In *Vasanth Kumar*, we saw him berate "the pitfalls of the traditional approach" towards the question of reservations "which," he declared, "has generally been superior, elitist and, therefore, ambivalent. A duty to

¹*State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 361, paras 118-19.

undo an evil which had been perpetuated through the generations is thought to betoken 'a generosity and far-sightedness that are rare among nations'. So a superior and patronizing attitude is adopted...." Citing expressions that figure in the pronouncements of other progressives – the "preferential principle", "protective or compensatory discrimination" – he dismissed them as "expressions borrowed from American jurisprudence," and declared, "Unless we get rid of these superior, patronizing and paternalistic attitudes," it will be difficult to truly appreciate the problems and claims of Scheduled Castes and Tribes and other backward classes.¹

As for borrowing from the Americans, the progressive judges, including Justice Chinnappa Reddy have no difficulty resting their case on reproductions from Max Weber, R.H. Tawney, Marc Gallanter, and such sterling upholders of the Gospel as the American magazine, *Monthly Review*! And, of course, on quotations from judgments of American courts. To say nothing of the *Theses on Feurbach* written by that other Westerner!

¹K.C. Vasanth Kumar v. State of Karnataka, (1985) Supp. SCC 714, at 737, para 34.

On the ground

The situation in the field

When controversies broke out over V.P. Singh's decision to implement the Mandal Commission's recommendations, at the *Indian Express* we looked at what was happening in the states. The results were to a pattern.

Kerala conducts a common examination for entrance to medical and engineering colleges. Marks scored in this examination are not normally revealed. Ranks, however, are available.

That year about 20,000 candidates wrote the examination for the 700 MBBS seats available in the state.

A candidate having been born to a "forward caste" had to rank 412 or higher to get in. A candidate from the Ezhava caste – recognized as a backward one in Kerala – however, got a seat though his rank was 1,605. A Muslim candidate – Kerala has reservations for Muslim "OBCs" – got in although he ranked 1,752. A Latin Catholic, again an "OBC", got in although he ranked 2,653. A Scheduled Caste candidate got in although he ranked 4,409. The really fortunate one, of course, was the candidate who could register against the quota for Scheduled Tribes. He got a seat although he ranked 14,246.

Some way to select doctors.

Some way to encourage our youth to strive for excellence.

The pattern is repeated in state after state, my colleagues reported from the state capitals.

To qualify in the corresponding examination in *Andhra*, a candidate from a caste for which there are no reservations had to secure a minimum of 45 per cent, a candidate from a caste for which there are reservations had no minimum to cross.

Chandigarh's prestigious Post-Graduate Institute of Medical Education and Research (PGI) turned out to be no exception. The general category candidate had to secure at least 50 per cent marks, candidates from the Scheduled Castes, Backward Castes and

Scheduled Tribes had no minimum to cross. They got in with 20 per cent, 15 per cent and 11 per cent as they had to compete only amongst themselves, i.e. only among those who did not qualify on merit.

In *Karnataka* a Scheduled Caste candidate needed to score 67 per cent to qualify for the medical colleges, an "OBC" candidate 75 per cent; but the one whose caste had not been anointed in this way had to score a minimum of 90 per cent.

In *Madhya Pradesh* that year the cut-off mark for general candidates seeking admission in medical and engineering colleges was 66.6 per cent, but for candidates from the Scheduled Castes it was 35.7 per cent. Nominally, the minimum marks for passing in the state were 40 per cent.

In *Rajasthan* the corresponding figures that year were 65 per cent for general category candidates, 48 per cent for OBC candidates and 42 per cent for Scheduled Caste candidates.

In *Punjab*, 50 per cent for the general category and 25 per cent for the Scheduled Castes.

In *Gujarat*, 60 per cent and 45 per cent.

In *Goa*, 79 per cent and 48 per cent.

For seats in *U.P.*'s engineering colleges the cut-off mark for the merit quota was 64.3 per cent that year. It was lowered first to 60 per cent and eventually to 58.3 per cent. Even so, it remained two and a third times the cut-off mark for candidates in the reserved category, which was 25 per cent!

Tightening for meritorious, letting go for others

It is not just that the lowest qualifying marks for the reserved seats are 10 to 25 per cent lower in state after state. It is that, in practice, because of the intense competition for the ever dwindling proportion of seats in the open category, the marks a candidate must secure to bag one of these seats far exceed the qualifying barrier. On the other hand, because of the paucity of candidates from castes which have wrested reservations, the marks that a person aiming for one of the reserved seats need secure fall lower and lower by the year, in many years they have been well below what has been prescribed as the "minimum qualifying percentage".

Thus, in *Bihar*, in the year V.P. Singh, to save his Prime Ministership, lunged for Mandal, the minimum qualifying marks for

admission to medical colleges were 50 per cent and 40 per cent for the open and reserved categories respectively. In actual fact, candidates had to secure 70 per cent and more to make it in the former category, while in the latter case the qualifying marks themselves had to be lowered to 35 per cent, and then to 33 per cent to fill in the quota available.

In *U.P.* the qualifying marks for the medical colleges were 55 per cent for the general category and 40 per cent for the reserved quota. In actual fact, candidates in the former category getting below 77 per cent could not get a seat, while in the latter those with 48 per cent did so.

In *Madhya Pradesh* the qualifying mark in the examinations held five years earlier had been 40 per cent. That year, to fill the reservation quotas in medical and engineering colleges, the minimum acceptable mark had been lowered to 25 per cent.

In *Punjab* also the minimum qualifying marks for Scheduled Caste candidates for medical colleges had been lowered from 40 per cent to 25 per cent. In brief,

- ❑ We observed vast differences in what is required of candidates merely on account of their birth;
- ❑ Severe competition for the seats in the general category leading to high qualifying marks, and, on the other hand, progressive relaxation of standards to fill up reserved quotas;
- ❑ The latter relaxations were being carried to frightfully low levels.

The current position

In the last quarter of 2005, through my friend, Shekhar Gupta, the Editor-in-Chief of the paper, I requested correspondents of *The Indian Express* to find out whether the state of affairs had improved since the early nineties. The facts they set out speak for themselves.

In *Karnataka*, 50 per cent of seats in all professional courses are reserved. General merit students have to score a minimum of 50 per cent to qualify for a medical course, those seeking admission against reserved quota get in with 40 per cent. In engineering, the minimum is common – a low 35 per cent. In architecture, the threshold is 50 and 40 per cent respectively. Admissions to professional colleges are based on rankings in the Common Entrance Test. In 2005, for

admission to the course in medicine, general merit students who obtained ranks below 540 did not get into the free seats category; while those in the reserved quota got in with ranks as low as *forty thousand seven hundred and ninety nine*.

Students seeking admission have to take examinations in Physics, Chemistry and Biology. Out of 60 marks, the student who obtained the 40,799th rank, secured 2.75 marks in Physics, 6.5 in Chemistry and 8 in Biology. He got in. A student who secured 34.25, 41 and 48 respectively in those subjects, did not.

In the dentistry course, a student with the rank 31,014 failed to find a seat. A reserved caste student with a rank of 42,493 got it. This latter student scored 5, zero, and 5 marks in the three subjects respectively.

In engineering, there was the phenomenon to which we shall soon turn – unfilled seats. As a result, a student from one of the Scheduled Castes who secured rank 60,079 got admission. He secured zero, 3.5 and zero out of a maximum of 60 in Physics, Chemistry and Mathematics.

The story had been the same in 2004. For the medical course, a student who got 6.5, 12 and 20 in Physics, Chemistry and Biology, and ranked 29,196 got a seat as he was from the reservationists' category. And a student who secured 26.75, 41.75 and 53.25 in those three subjects and ranked 496 was denied a seat as his caste had not been powerful enough to get itself anointed backward.

For the dentistry course, a reserved category student who ranked 35,734 with 6.25, 13.75 and 12.5 in Physics, Chemistry and Biology got a seat, while a general category student with rank 2,658 and marks 20.5, 27 and 45, was denied the opportunity to study the course.

In engineering, a reserved category student with a rank of 51,117 and 1, 0.5 and zero marks in Physics, Chemistry and Mathematics got admission...

The correspondent from *Jharkhand* reports similar figures. He lists the case of KK, a reserved category student: this student got admission even though in the 2004 examination he secured 2 and 1 marks out of 100 in Physics and Chemistry. The correspondent lists the case of SH: she got into the Engineering College even though she had secured just four marks out of a total of 300 in the entrance examination...

In early 2006, the Supreme Court received a reminder of the situation that has been fomented. N. Senthil Kumar *topped* the entrance test for the Jawaharlal Nehru Institute of Post Graduate Medical Education and Research, Pondicherry. But he was denied admission! Half the seats are reserved for those coming through an entrance test conducted by the All India Institute of Medical Sciences, Delhi, and the other half for reservationist castes. The three judge Bench was "visibly disturbed", the newsagency reported. "An anachronism has set in," the Additional Solicitor General conceded...

How can it be that criteria and norms which bring about results of this kind shall not affect the standards of education and professional expertise? Directly, by the calibre of persons who are given the scarce seats as against the calibre of those who are denied the opportunity. And, even more so, indirectly, by the effect that such skewed results are certain to have: both on the morale of competent students, and by what they teach students about the value of hard work and the rest – both categories of students, those who qualify to compete only for the general category seats and those who get the reserved category seats, will learn that it is not hard work that counts, it is one's birth.

What a way to be a knowledge super-power!

We should notice one fact in passing. There is one change in a few states since the early 90s, and it shows one route to a partial cure. Correspondents from Gujarat, Punjab, Maharashtra, and Rajasthan report that in the engineering course, no anomalies of the kind we have noted occur any longer: so many engineering colleges have come up in these states, they report, that seats go abegging. No student is denied admission because of his birth. The problem now is of another kind: persons who have scored zero in their entrance examination, also get admission – with consequences for the quality of tomorrow's engineers. That problem is a critical one; however, it is different from the one we are considering in this essay. But the fact that, in such states, reservations are not resulting in the kinds of anomalies that we have noticed, points to one solution – we should multiply educational institutions and seats, and to that extent at least the injustice arising from excessive reservations will abate.

And yet, there is an obvious limit to this "solution". We cannot

replicate it in government services. Or should we? By just going on multiplying government jobs!

In the services

The same pattern, with the same consequences, is by now stamped into the services – up to the highest level of posts.

It is not just that half the seats are set aside at the time of entrance to a service. Seats have to be set aside at *every level* of the service. That is, they have to be set aside in promotions also. And in several branches of Government, promotions have got further sub-divided into minute compartments by what has come to be known as the *Roster System*.

It is in operation in states like Gujarat and Karnataka where it has already led to rupturing one department after another. Here it is.

Posts in each category at different levels are entered on to a Roster. Posts at specified serial numbers are earmarked to be filled *only by persons* who belong to one of the castes for which there is reservation. Thus, for instance, in a department, post number one may be designated to be filled only by a member of a Scheduled Caste, post number four to be filled only a member of a Scheduled Tribe, etc. Persons from castes which are not entitled to reservations must wait till numbers two or three fall vacant. And, when these fall vacant, they must, of course, contend with *all* employees, including those from the Scheduled Castes and Tribes who are entitled, naturally, as much as anyone else to fill these “general” posts.

Nor is that all. In some states the Roster is minutely classified. It is not just that posts number two and four and... may be filled only by, say, a member of the Backward Castes. The Backward Castes have themselves been further classified into sub-groups – in Karnataka into five sub-groups. So that post number two or seven, as the case may be, must be filled not just by a member of the Backward Castes but by a member of Group A of the Backward Castes. And so on.

In this way, many an employee leap-frogs – my colleague in Ahmedabad at the time, M.K. Mistry, illustrated the consequence with the case of a Backward Caste employee getting *two promotions in one day* – while others languished. In Delhi, we learnt of a person who *joined the service* in 1957. Regarded as efficient by all, at the time of our survey in 1992, he was working under a young lady *who was born*

in 1966, the latter having received the manna of accelerated promotions because of her birth.

And so on.

First: reservations at the point of entry.

Then: reservations in promotions.

Then: reservations in promotions in accordance with minutely classified Rosters.

And we are to believe that none of this will affect the efficiency by which government functions.

My colleagues at *The Indian Express* reported the ill-effects this has had in state after state, in department after department. The railways, the medical service in U.P., the education set-up in Kerala – in each instance, they found wide-spread demoralization and resentment among the general category employees, and bitterness between them and the reserved category employees.

Apart from this general vitiation, several specific features stand out.

The first feature arises from the fact that, in spite of relaxed standards, special recruitment drives and all, it has been extremely difficult to fill the quotas set aside for these castes. Naturally, the lucky ones who get in at this stage, leap-frog to the higher posts. Thus, for instance, in spite of strenuous efforts to locate doctors from Scheduled Castes and Tribes, it had been possible in 1992 to fill only 6 per cent of the posts in U.P.'s medical and health department with persons from these castes. But the law prescribed that 20 per cent of promotions shall be reserved for doctors from these castes. As a result Dr. 'A' – there is no point in giving the names though these were sent to me – was promoted to the post of Joint Director superseding 100 doctors; Dr. 'B' was promoted to that post superseding 500 doctors; Dr. 'C' superseding 900 doctors; Doctor 'D' received the scale superseding 1,600 doctors; Dr. 'E' was appointed Chief Medical Officer of a large city superseding 1,100 doctors; Dr. 'F' was appointed Chief Medical Officer of another large city near Delhi superseding 1,500 doctors... The result? "The Medical and Health Department of the UP government," wrote my colleague S.K. Tripathi, from Lucknow, "has been seething with resentment because of large scale supercessions which have resulted from having the 20 per cent quota even in promotions..."

The figures had reached startling proportions even in the early 1990s in many instances: all but three of the twenty top posts in the General Education Department in a state, reported a colleague; six of six posts in the highest grade, in a Claims Office in South Eastern Railways, railway employees reported on the basis of documents lodged in courts; 21 out of 29 posts in the next highest grade; 16 of 26 posts of Office Superintendents in a Chief Works Manager's office in Western Railways... All these had gone to persons because of birth.

As the Roster binds the department or enterprise to fill posts numbered such and thus only by persons from the reserved castes, the minimum requirements which have been specified for those posts – for instance, that the person must have served 'X' number of years in the preceding post – are routinely set aside for these employees. As are mandatory departmental examinations which are meant to ensure that the person has at least the minimum abilities necessary for the job at the level to which he is being promoted. Railway employees brought me detailed evidence on specific cases. 'A' joined as a casual waterman in August 1958; by 1980 he was Office Superintendent, the highest post in Grade III, not because he had acquired additional skills which his peers did not have, but because of his caste; he would have gone much higher, they pointed out, but for the fact that he was not even a matriculate... 'B' was appointed Clerk in mid-1958, ranking 84 in the "seniority list"; by 1974 July, having secured four promotions within Grade III, he was promoted as Assistant Personnel Officer to Grade II; by March 1982 he was Divisional Personnel Officer; at the time of our survey, he was on the verge of being promoted to the post of Junior Administrative Officer – again, not because he had gathered additional qualifications over other railway officers, but because of his caste... 'C' joined Railways as a *safaiwala*; he was appointed a Clerk against a reserved quota post; he ranked 131 in the "seniority list" at the time; within years, leap-frogging over others, he became Senior Clerk...; he too, a matriculate, was going to make it to being a Class I Officer; again not because...

Four consequences are evident:

- ☐ Employees inducted against reservations take far fewer years to reach the higher posts than the general category of employees;
- ☐ They reach much higher posts by retirement than the latter;

- ❑ As they ascend to higher posts when they are still young, the promotion prospects of others – the general category employees over whom they have leap-frogged – are blocked, permanently as far as this generation of employees is concerned;
- ❑ Because of these accelerated promotions, because of crash recruitment drives in which persons from reserved castes are inducted directly to higher posts, and because of the pernicious working of the Roster System, in several departments an overwhelming proportion of the top posts are now occupied by persons who have climbed up the reservation route.

Table after table from officers

Have things changed since the early 1990s?

I contact officers in Karnataka, M.P., Rajasthan, Punjab. And learn, "Yes, they *have* changed. They have got much, much worse." Data from department after department testifies to this.

Karnataka: The state has decreed 15 per cent reservations for Scheduled Castes and 3 per cent for Scheduled Tribes, a total of 18 per cent. Officers of the Public Works and Irrigation Departments send data about engineers. As against the 18 per cent quota, a quarter of the Junior Engineers (Special Grade) and two-thirds of the Assistant Executive Engineers (Division II) are from the SCs/STs. Twenty per cent of both Assistant Executive Engineers (Division I) and Executive Engineers; 42 per cent of Executive Engineers; 15 per cent of Chief Engineers and 30 per cent of Engineers-in-Chief are from these reserved categories.

The officers report that, because of the operation of the Roster, by end 2006, all the posts of Engineers-in-Chief; 95 per cent of those of Chief Engineers; 82 per cent of those of Superintendent Engineers; and 42 per cent of those of Executive Engineers will be manned by members of SCs and STs. From 2007, all the posts of Chief Engineers; from 2015, all the posts of Superintending Engineers; from 2020, all the posts of Executive Engineers will be manned by these castes and tribes.

They send me a table listing engineers. These joined service between 1982 and 1984. The names are aligned: reservationists and general category engineers who joined at approximately the same date are coupled. Each of the reservationists became an Assistant

Executive Engineer between 1991 and 1993. The general category engineers will not attain that grade till 2012 and 2014.

In the Bangalore Water Supply and Sewerage Board, almost 80 per cent of the Chief Engineers are already from SCs and STs. By next year, all of them will be only from these categories.

The officers in that Board also send me a table. Of the engineers from the general category who joined the service in 1971 to 1974, BPK retired without ever becoming Executive Engineer; PJSM, BGSS, SS, SRRK got to become Executive Engineers after twenty years of service, in 2002. On the other hand, TV and SMB, from the reservationist castes, having joined *eight years after* the foregoing, became Executive Engineers in 1997, that is *five years before* their general category colleagues. Not just that, both of them climbed the next stage and became Superintending Engineers in 2002. And have since climbed yet another rung, and become Chief Engineers in 2005!

Officers of the Karnataka Power Transmission Corporation furnish a similar list. As a result of reservations at entry, in promotions, as a result of the operation of the Roster System, and as a result of reservationists now getting "consequential seniority" also, already 28 per cent of Chief Engineers and 28 per cent of Superintending Engineers are reservationists. By 2014, all the Chief Engineers and 61 per cent of the Superintending Engineers will be from these castes.

Officers from the Public Works Department, Madhya Pradesh, send a corresponding table. It lists general category officers – they joined service between 1979 and 1984. Not one of them has got even one promotion till now: they are consigned to languish as Assistant Engineers. Then follows a list of engineers who entered as a result of reservations, and have been receiving promotions as a result of reservations. They joined service in 1987. All of them became Executive Engineers in 2001 and 2002. Four of them became Superintending Engineers in 2005. They, as well as two more, are scheduled to become Chief Engineers between 2007 and 2009. One of these becomes Engineer-in-Chief in 2009, and three in 2010... Between 2010 and 2030, all positions of Engineer-in-Chief, Chief Engineer and Superintending Engineer will be occupied by reservationists. The Engineer-in-Chief will be *junior* to the *junior-most* Executive Engineer of the general category...

Lists to the same effect from Punjab and Rajasthan... In the Medical and Health Department of the latter, persons who were so young as to be taught by Doctors RPG, GCJ, AS, AC, RPST, BKJ, AS, and a series of others, now lord it over the latter...

The Court's judgments themselves

In fact, one can glimpse enough even from the judgments of the Supreme Court itself to realize the damage that reservations of this order, and inventions like the Roster System are inflicting on the quality of educational institutions as well as the services.

In one judgment after another we come upon perversities that have resulted from the successive enlargement of reservations, and from the increasingly complex regulations that have been put in place ostensibly to give effect to the mandate of the Constitution.

In *Ajit Singh v. State of Punjab* and other cases alluded to in that judgment, the Supreme Court, having been presented in the writs with glimpses of what has come about in practice, observes that reservations and the regulations under it should not be pushed to such an extent that they result in reverse discrimination; that they "should not be pushed to such an extreme point so as to make the fundamental right to equality cave in and collapse"; that "affirmative action stops where reverse discrimination begins"; that "the provisions of the Constitution must be interpreted in such a manner that a sense of competition is cultivated among all personnel, including the reserved categories." The Court notes the consequences of one of the devices, the Roster System, of the reservation regimen:

Now in a case where the reserved candidate has not opted to contest on his merit but has opted for the reserved post, if a roster is set at Level 1 for promotion of the reserved candidate at various roster points to level 2, the reserved candidate, if he is otherwise at the end of the merit list, goes to Level 2 without competing with general candidates and he goes up by a large number of places. In a roster with 100 places, if the roster points are 8, 16, 24, etc., at each of these points the reserved candidate if he is at the end of the merit list, gets promotion to Level 2 by side-stepping several general candidates. That is the effect of the roster point promotion.¹

How does this consequence square with what the Supreme Court

¹*Ajit Singh v. State of Punjab (II)*, (1999) 7 SCC 209, at 234, para 41.

had in the immediately preceding paragraphs of the same judgment said had to be ensured? That there should be no reverse discrimination; that the fundamental right to equality should not be made to cave in; that "a sense of competition is cultivated among all personnel, including the reserved categories"?

The Supreme Court is itself compelled to refer to the consequence as "the poignant scenario" that hobbles so many. A little later in the same judgment we read,

We next come to the poignant scenario in several of the matters before us. *Vinpal* referred to such a scenario where *all the 33 candidates who were to be considered for 11 vacancies were from the SC/ST category...* Before us, similar facts are placed by the general candidates. The factual position is not disputed, though certain reasons have been set out by both sides which none has scientifically examined. It is to be noticed that: (i) in *Ajit Singh* itself... as on 30.9.94 out of 107 officers working as Superintendent Grade I, the first 23 officers are from Scheduled Castes. At the level of Under Secretaries, out of 19, the first 11 are from SC category. In the category of Deputy Secretary, out of four, 2 are from SC category. As on 30.9.94, the position was that at these levels, the percentage was 22.5%, 54% and 67% respectively in the above categories. If the seniority is to be counted as per the case of the reserved candidates, the position would be that Deputy Secretaries would be 100% manned by Scheduled Castes, and Under Secretaries would again be 100% manned by Scheduled Castes while Superintendents Grade I would be so manned to the extent of 53%. (ii) In *Jatinderpal Singh's* case... *the top 134 positions of Principals (from Head Masters' source) would be from Scheduled Castes while the top 72 positions (from Head Mistresses' source) would be from Scheduled Castes.* It is stated that 'adding this to the number awaiting promotions', the position would be that top 217 and 111 in these categories would be Scheduled Caste candidates – which would be 100% and 71% (the posts being only 156 under each source). One does not know what will happen in posts beyond Principal, if all persons in the zone are from SC/ST category. (iii) In *Kamal Kant...* as of today: (a) among Deputy Secretaries, *the first 8 posts are occupied by the reserved category* (Scheduled Castes and Backward Classes); (b) among Under Secretaries (Group A) (officiating), 14 posts at the higher levels are occupied by the reserved category. The above factual position is not, in fact, disputed but it is said that this could be because the roster was operated again and again till that was stopped after *Sabharwal* was decided, but no body has gone into the extent to which excess roster operation has created such a situation.¹

¹*Ibid*, at 245, para 73.

Once again, as an exercise, read the desiderata that the Supreme Court had spelt out, and assess how the facts the Court itself has set out in such cases stack up in the light of those desirables.

In *R.K. Sabharwal*, the Supreme Court tells us,

It is stated in the writ petition that the petitioners are at serial Nos. 19, 23, 26, 29, 30, 31, 34 and 38 of the seniority list of the Service whereas the respondents are at serial Nos. 46, 140 and 152. Respondent Rattan Singh was promoted to the rank of Chief Engineer against the post reserved for the Scheduled Castes *by superseding 36 senior colleagues* including the petitioners. Similarly, respondents Surjit Singh and Om Prakash were promoted as Superintending Engineers against the reserve vacancies *by superseding 82 and 87 senior colleagues* respectively. According to the petitioners at the time of promotion of these respondents the petitioners were already working as Superintending Engineers for several years. It is further averred in the petition that respondents 4, 5 and 6 were in fact working as Executive Engineers when the petitioners were holding the posts of Superintending Engineers.¹

Such examples can be multiplied many times over from successive judgments of High Courts and the Supreme Court. The situation continues to be exactly the same in 2006, correspondents of *The Indian Express* tell me. From state after state, they list instance upon instance that testifies to the consequences that the Roster System is inflicting on individuals, consequences that have affected the efficiency as well as the morale of services.

From *Gujarat*, we have the case of BG, a candidate who got in through the quota reserved for tribals in 1978. She joined as a Section Officer. She is today an Additional Secretary because of successive out-of-turn promotions she has obtained along the way because of the Roster System. Her 16 batch-mates are stuck at lower levels.

In *Punjab*, the State Electricity Board has been well-nigh split because of this system. Once the 85th Amendment is implemented, the staff say, 21 of the total 28 posts of Chief Engineers will get occupied by persons who have come up through the reserved categories. With higher posts getting pre-empted, of the 110 Superintending Engineers who were in position in the last quarter of 2005, just 10 would get a promotion – the rest would have retired before their turn comes for promotion.

¹*R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745, at 748, para 1.

In *Karnataka*, promotions in the Government service are done according to a 33 point Roster System – every seventh vacancy in a department is to be filled by promoting a Scheduled Caste candidate, every 32nd vacancy by promoting a Scheduled Tribe candidate. As a result, to cite a typical instance, “X” who joined the Police Department in 1970 has been overtaken in seniority by sub-inspectors who joined *nine years later*. “Y” was promoted to the rank of Superintendent of Police in 2004 while those who joined through the reservation route *nine years after him* have been Superintendents of Police *for five years*. Incidentally, *already 50 of the 76 SP level posts in Karnataka are now occupied by reserved category candidates*.

In *Uttar Pradesh*’s power set up, reports *The Indian Express* correspondent, there are around 3,000 engineers. Of these 650 are from the reserved category. There are “anomalies” galore. For instance, he reports, while officers belonging to the *1974 batch* of engineers of the general category have just about managed to become Executive Engineers in 2004/05, and the *1972 batch* have reached just the Deputy General Manager’s level, Scheduled Caste candidates of the *1982 batch* have become General Managers, and Scheduled Caste candidates of the *1989 batch* have become Deputy General Managers. Similarly, Scheduled Caste officers of the *1997 batch* are already Executive Engineers, while officers from the general stream who joined in *1985* are still Assistant Engineers.¹

In *U.P.*’s Irrigation Department, Assistant Engineers of 1978 vintage are yet to be given their first promotion to the level of Executive Engineers. Scheduled Caste engineers, however, who joined four years later, in 1982, are already Superintending Engineers and Chief Engineers.

The correspondent from *Madhya Pradesh* lists a typical case from the state. “X” joined the Directorate of Public Relations as Information Assistant in 1991. According to the Roster, he was placed sixth in the list of probable promotees. “Y” had joined two years later through the reserved category. He was placed 21st. Even though he was placed 16 places behind “X”, and even though he had joined two years later, “Y” has just been made Assistant Public Relations Officer. “X” not only

¹Posts of Executive Engineer and above are Class-I posts. The first promotion is due after serving for seven years as an Assistant Engineer. An officer attains the level of Superintending Engineer or Deputy General Manager after 16 years of service.

continues to languish in the original post, he is likely to continue to be at this level four years from now...

In *Jharkhand*, the results are before the courts. A typical case they are examining is that of SKS, a 1980 batch officer. In the merit list of the then combined state of Bihar, he figured in the top 20. SS and JT figured in the bottom 20. But the latter two are from a reserved category. Today, because of reservations in promotions also, SS and JT are Joint Secretaries and, therefore, the bosses of SKS who continues as Deputy Secretary.

I seek figures through my friend, Harivansh, the distinguished editor of *Prabhat Khabar*, the leading paper of Jharkhand. What has come to prevail in practice, caveats in *Indra Sawhney* and the like notwithstanding, cannot but harm the efficiency of administration. In addition, meteors descend. In May 2001, the Jharkhand Government decreed that instead of 50 per cent of posts being reserved, 60 per cent shall be reserved. The decision went up to the High Court. It struck down the decision, and directed that the reservation be scaled back to 50 per cent. But another factor was in operation at the time: the state had just been carved out of Bihar, and the services had been divided between the two new states. The combined result of the partitioning of the services, the reservations policy, and, most important, the operation of the 85th Amendment of the Constitution was that by early 2006, *seventy-eight per cent* of Joint Secretary level vacancies, and *sixty-four per cent* of Deputy Secretary level vacancies had been given to members of Scheduled Castes and Tribes. Similarly, in the Finance Service of the state, *sixty per cent* of the Joint Secretary posts had come to be occupied by persons from Scheduled Castes and Tribes. The point here is most emphatically not that they should not be occupying posts at these levels. But that they had come to occupy this proportion of posts because of the accident of their birth, and because of the operation of the way the Constitution has come to be interpreted and altered.

The *Indian Express* correspondent in *Rajasthan* reports several cases of the same kind. Dr. JS is a 1982 batch doctor. He is Assistant Professor at a medical college in the state. He has not received a single promotion since he joined 23 years ago. Three of his students are Professors, thanks to reservations in promotions. Similarly, Dr. RA is Assistant Professor, Surgery. Half a dozen of his colleagues and

students have become Professors. RKJ is still an Upper Division Clerk in the Rajasthan State Secretariat Service after 30 years of service. But BSM, who joined as Lower Division Clerk through the reserved categories just two years before RKJ, has got four promotions and is today a Deputy Secretary...

The correspondent in *Guwahati*, reports that such anomalies "are very common" in Assam...

Do not get me wrong: I rebel against notions of seniority, etc., criteria by which government servants get a right to secure some post or seat automatically, irrespective of their work, irrespective of whether they have qualifications for the job that has to be done. If seniority is disregarded because a person lower down on the seniority list is better able to do the job at hand, he *should* get the job compared to one who is higher on the seniority list but is demonstrably less qualified for the task. But in each of these instances, the persons who have leap-frogged have done so solely because of their birth. There is not even the claim that they have leaped over the others because they are more meritorious. What are we encouraging, what kind of conduct and effort are we inducing when a person 140th or 152nd on the list is promoted over the head of one who is number 19 – *because the former was born to one set of parents rather than another?*

But one can be certain to find in the judgments of the highest Court passages by which one can legitimise the relaxations of standards and the resulting anomalies. In *Indra Sawhney*, the majority held that the "larger concept of reservations takes within its sweep *all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations*, consistent no doubt with the requirement of maintenance of efficiency of administration – the admonition of Article 335." The judges draw this inference from the use of the word "any" in Article 16(4). The Article, it will be recalled, lays down, "Nothing in this article shall prevent the State from making any provision for the reservation of..." "Here the use of the words '*any provision*' for the reservation of appointments and posts' assume significance," the judges say. "The word '*any*' and the associated words must be given their due meaning. They are not a mere surplusage."¹

¹*Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, para 743. Cited often, for instance in *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684, paras 23, 24.

That apart, how can it be that such “relaxations” are foisted on a system, and standards in the classrooms still remain unaffected?

Nor will standards survive any better in services. It does not require rocket science to see that it would not be necessary to set aside half the seats in a course or in a service if the reservationists were well equipped to compete for them. The very fact that the rest of the population has to be barred from competing for these seats itself shows that persons for whom these seats are being reserved do not have the requisite qualifications at the time of selection. Remember also that if a person from a caste that has been anointed as “Backward” or has been put in the Schedule qualifies on his own in the “general list”, he is automatically *not* counted against the reserved quota. Hence, those who are inducted in the reserved quota are *by definition* ones who would *not* get in but for the reservations. This being explicit in the very scheme of reservations, how can our judges maintain that efficiency will not be affected?

Three points are noteworthy:

- ❑ The reservationists have got to leap over the others not because they displayed greater proficiencies but because of reservations and the related paraphernalia – the Roster System, and the like.
- ❑ They know this, and so do the others: how can the outcome not affect morale and discipline, indeed the entire work culture in the services?
- ❑ The persons who have leap-frogged are young: as a result, they will occupy all the available senior positions for years – the general category employees will never reach those senior posts for no fault of their own except their birth.

Only two facts need to be added.

These consequences had ensued when reservations were only 22.5 per cent or thereabouts. Since then, reserving half the positions has become the norm.

Second, at that time in most states the quota in promotions was limited to Classes II, III and IV alone. An employee could avail of these accelerated channels only up to the starting point of Class I posts. Since then, the Constitution itself has been amended to prescribe that quotas shall be set aside for promotions “*at all levels*”. Imagine the situation then when posts of Secretaries and Additional

Secretaries to government are packed in this way and to this extent – as they must inevitably be when the Roster is put in operation; when they are packed, that is, by persons who by definition lack the qualifications necessary for the job.

In view of such facts, what will the Supreme Court say as it recalls the warning which even so progressive a judge as Justice P.B. Sawant had given in *Indra Sawhney*? Re-read the words cited above at pages 193 to 197. Has his warning not come true? Exactly as he had forecast, the general category employees are seething with a sense of injustice, and the reservationists have no goad to put in their utmost – they are going to leapfrog over the others in any case, performance or no performance. Nor are the resulting mal-effects confined to individual employees – exactly, as Justice Sawant had warned, administration depends on the entire atmosphere in which the apparatus of governance functions, and it is this atmosphere which has got vitiated: services have got divided on caste lines; officials are convinced that merit and performance do not count; officials dare not speak or write the truth about bad conduct or poor performance of a subordinate, lest they be accused of harbouring a prejudice against persons of some caste.

A basic feature of the Constitution

This essay deals primarily with Articles 15 and 16. But we must remember that many of the same sorts of considerations apply to Articles 330 and 332. Under them, out of a total of 543 seats in the Lok Sabha and 4,091 seats in the state Assemblies, 120 and 1,081 seats are reserved respectively for Scheduled Castes and Tribes. The seats are further split between Scheduled Castes and Scheduled Tribes. For instance, of the 120 seats reserved in the Lok Sabha, 79 are reserved for Scheduled Castes and 41 for Scheduled Tribes. Candidates belonging to these categories alone can stand for elections from these constituencies.

Four features tell the tale. First, as we saw, Gandhiji had to agree to this kind of reservation in 1932 to head off the British Government's Communal Award. At that time, it was understood that the seats would be reserved for twenty years. The reservation would have expired in 1952. In fact, it has continued to this day – indeed, no one

dare even contemplate a date, howsoever distant in the future, when reservations in legislatures will be ended.

Second, legislators who are elected as a result of such caste-based reservation see themselves primarily as persons from that caste category: they meet and function as a caste-block, across party lines. That has immediate consequences for legislation as well as for policy: all parties have to bend to the block, all the more so when legislatures have become as splintered as they have today. The more they function as a caste-block, the more these legislators are able to get their way. The more they get their way, the more their caste identity is reinforced – in their eyes, in the eyes of their voters, in the eyes of the Executive.

Third, members of these caste and tribal groups are said to constitute 20 to 30 per cent of the electorate in these reserved constituencies. As they alone can stand from them, the 70 to 80 per cent of non-SC/ST voters who reside in these reserved constituencies in effect lose their right to represent the voters of the constituencies.

Fourth, within the general Scheduled Caste and Scheduled Tribe category, the dominant sub-caste or tribal group, say, the Meenas in Sawai Madhopur, corners and is able to perpetuate its hold over the seat for decades.

Each of these features strikes at the fundamental premise of representation – that is, at the basic feature of the Constitution. And yet, as of now, there is no prospect at all, that any corrective will be initiated any time in the foreseeable future.

The real way

The State structure and beyond

As will be evident, in the end, their prescription is little more than a tautology: it does not just flow from, it is embedded in the assertions of the progressive judges, in the very meanings they read into words. But there are also basic differences between their point of view and that on which this book is based.

- ❑ *Manusmṛiti*, as we have it, is estimated to have been collated over 700 years: which passages in it are from the original, which are later interpolations? Interpolations by persons of what authority?
- ❑ Was India ever what stray verses in Manu suggest it ought to have been?
- ❑ Is India today what those stray passages suggest it should have been two thousand years ago?
- ❑ Assume that “the reality of India today” is what progressives say it is, should we focus on “reality” as it is today, or adopt such measures as will erase the blemishes that mar that “reality”?
- ❑ Assume that the wrong and injustice have persisted for centuries, can it be eliminated in a few years? Will steps to ensure that it is eliminated within a few years not result in the very sorts of distortions and inequities and derailments that have been seen so often in history, including the recent history of regimes that set themselves up in the name of Justice and Equality?
- ❑ Does the Constitution aim at equality of opportunity or of results? Is the “equality of results” not another will-o’-the-wisp? One in pursuit of which anything and everything can be justified, justified to any extent, and for any length of time?
- ❑ Will the extent to which these progressives insist we focus on equality not bury other values enshrined in the Constitution?
- ❑ Is the best way of improving the lot of the dispossessed to equalize, or to ensure growth?

- ❑ Is the purpose of a provision such as Article 16(4) to just enable the State to take measures to induct the disadvantaged into the apparatus of government or is it a command to do so?
- ❑ Is the objective of such a provision a radical redistribution of power?
- ❑ Are the disadvantaged better helped by getting half the seats in government or by an administrative mechanism staffed by the very best?
- ❑ Is setting aside half the jobs the way to help them, or is it the slew of measures that will raise their capacities to perform those jobs?
- ❑ Does the Constitution allow special measures to help the disadvantaged, or does it demand that the more skilled be weighed down by handicaps?

The central difference concerns a pragmatic judgment. I believe that the judges have grossly underestimated, indeed they have disregarded a central lesson of recent history: discourse and politics, eventually interests and power, congeal around the criterion or programme that is deployed by the State. By legitimizing a programme based on caste, they have perpetuated a tumour. They have not just slowed down growth, they have lowered norms of conduct, and thereby harmed the very ones whom they wanted to help. They have done worse: they have lent their hand to dividing our people and country.

Caveats waived aside

The Supreme Court has, or at least a few judges in it have often listed several caveats that must be observed while instituting reservations:

- ❑ The provisions are merely enabling ones, they do not confer a right on individuals and groups, they do not confer a duty on the State.
- ❑ Reservations must subserve, and must be shown to subserve to the satisfaction of the Court, the object of the constitutional provision – for instance, of Article 15(4) in the case of reservations in educational institutions;
- ❑ The reservations must subserve “other vital public interests” and “the general good of all”;

- ❑ Maintenance of efficiency of administration is a *sine qua non*, and the caution must always be borne in mind that the scheme does not dilute this efficiency; Article 335 is an over-riding mandate, "An inefficient administration betrays the present as well as the future of the nation"; any reservation made in disregard of this command, "is invidious and impermissible." "The State has a vital interest to uphold the efficiency of administration"; "To ignore efficiency is to fail the nation"; efficiency of governance is "a compelling State interest"; "To weaken efficiency is to injure the nation."
- ❑ The reservations must not be to such an extent and of such a sort that they cause reverse discrimination.
- ❑ There should be no reservations in certain services, in higher positions, in specialities and super-specialities as departing from merit in these will inflict grievous costs on all, including the disadvantaged.
- ❑ "The provisions of the Constitution must be interpreted in such a manner that a sense of competition is cultivated among all service personnel, including the reserved categories."
- ❑ Reservations are a transitory measure. As "the social backdrop changes," and changing it is "a constitutional imperative", "as the backward are able to secure adequate representation in the services," reservations will not be required. They must be devised and implemented in such a manner that they do not become "a super-fundamental right." The test of a reservations policy is how soon it obviates the need for such special measures...¹

But each and every one of these restraints has been blown up – by the political class, and by successive activist judges.

By now,

- ❑ As the judiciary must be "an arm of the socio-economic revolution";
- ❑ As the Constitution is an instrument – a living, dynamic, purposeful instrument – of this revolution;

¹Apart from *Indra Sawhney*, see, for instance, *Preeti Srivastava v. State of M.P.*, (1999) 7 SCC 120, paras 11, 12, 13, 15, 20; *State of Bihar v. Bal Mukand Sah*, (2000) 4 SCC 640, paras 32, 38, 48, 23, 58; *Ajit Singh v. State of Punjab (II)*, (1999) 7 SCC 209, para 18.

- ❑ As this revolution requires that those who have been disadvantaged be pulled up;
- ❑ As that pulling up can happen only when they have access to Government posts;
- ❑ As for this purpose, the State must ensure equality of opportunity so that no one is discriminated against on grounds of caste, religion, sex, etc.;
- ❑ As equality of opportunity will be a sham unless outcomes are equal;
- ❑ As merely removing discrimination in entering Government posts will not enable the downtrodden to occupy those posts, equality will remain a sham unless up to half the posts are reserved on the basis of birth;
- ❑ As power and status reside only in the higher Government posts, and as the downtrodden will not be able to acquire these on the basis of merit – measures of “merit”, and those who are to assess it being perverse – up to half of the higher posts too must be reserved for persons on the basis of their birth;
- ❑ As, in spite of such reservations, it may not be possible to find an adequate number of candidates from among the SC/ST/OBCs, the standards should be diluted to the extent that will yield the number of “qualified” candidates;
- ❑ As even after doing so, it may not be possible to find enough persons to man the posts, the vacancies should be carried forward...

Features

Several features of the course that the judgments have followed stand out.

First, over the years, this cascade of propositions has been the handiwork of just a few judges. They appropriated the high moral ground, and, as we have seen, stigmatized and pasted motives on to anyone who did not submit to their assertions. Recall the diatribe with which the contrary point of view is dismissed as the “vicious assumption typical of the superior approach of the elitist classes,” as nothing more than a reflection of “the age long contempt with which the ‘superior’ or ‘forward’ castes,” as nothing but the “crystallization of unfair prejudice”, as a conspiracy of racist Aryans, no less...

Second, the “reasoning” of the handful among them who have delivered the most consequential of these judgments in the last few years has more often than not consisted of no more than repeating again and again a few passages from the perorations of an even smaller number of their activist predecessors. And the latter, even as they declaimed against the influence of foreign jurisprudence on Indian courts, ever so often relied on some stray passage from a foreign magazine or broadcast or judge.

Third, several warts mar some of the judgments:

- ❑ Judges often counsel caution, often in strong words – as they do when they affirm that the efficiency of administration prescribed in Article 335 is an over-riding value; and in the next breath they approve the scheme that the government has instituted, a scheme that clearly flies in the face of the caution that the judges have just enunciated.
- ❑ To this day, the widest possible differences remain among judges even on elementary questions.
- ❑ Almost no attempt is ever made to locate even the flimsiest empirical basis for assertions. The assertions, in turn, are just ejections born of predisposition, even, going by the hyperbole in some of the judgements, of exhibitionist “commitment”, to put it no lower. The result is predictable: as in other types of cases, the outcome often depends, not so much on the facts or the law, nor even on provisions of the Constitution, as on the Bench before which the case lands.

Fourth, the others who sat with them on the Benches during those hearings, just went along. Did they do so because they agreed with that line of “reasoning”? Did they do so because, like much of the middle class, they too had internalized guilt? Did they go along because they were just a loose, changing collection while the progressives were a well organized charge? Or did they go along out of a moral pusillanimity, out of the apprehension that, if they did not, they would be dubbed anti-poor?

Indeed, as the years went by, as we have seen, those who set themselves up as the champions of the downtrodden became overtly, audaciously aggressive. When they did not get their way in one forum, they set out to use another. Their colleagues bent over

backwards to prove their “neutrality” and “compassion” by not standing in the way!

A typical and telling illustration is provided by what happened in drafting the Report of the National Commission that was set up to review the working of the Constitution. So blatant was the maneuver to smuggle passages into the Report, passages which went contrary to what had been decided that the principal author of the Report, Dr. Subhash Kashyap, was compelled to himself record a Note of Dissent. As Kashyap records, the text on reservations that incorporated what had been decided during discussions, and which was approved by the Commission’s Drafting Committee was as follows:

The Commission noted that the ultimate aim of affirmative action of reservation should be to raise the levels of capabilities of people of the disadvantaged sections and to bring them at par with the other sections of society. Reservations should not separate certain sections from others and should not become a permanent feature of Indian society. In this connection, it is important to recall that Dr. Ambedkar was opposed to reservations for Scheduled Castes in perpetuity. He would have liked it to be for forty years instead of ten years but thereafter he did not want Parliament to have the power to extend it by law because he did not like the *dalit* class stigma on Indian society to become permanent. Unfortunately, during the last fifty years and more, reservations have not enabled these disadvantaged sections come closer to others to desired levels. Reservations have also not really benefited those sections for whom these were meant. In many instances, these have been monopolized by certain privileged sections within those groups.

Instead, the passages that appear in the body of the Report propose that all laws relating to reservations be placed in the Ninth Schedule – so that they are completely beyond judicial review! They counsel that the State can institute reservations for minorities identified on the basis of religion without amending the Constitution, that it can institute them under Articles 14, 15 and 16 as they stand!¹ When I inquire who was responsible for these changes, Dr. Kashyap names an activist Judge we have encountered.

¹See, *Report of the National Commission to Review the Working of the Constitution*, Volume I, 2002, pp. 116, 123, 510.

Fifth, as such activism, indeed aggression and brazenness, have coincided with the progressive delegitimization of the political class, a delegitimization that has pushed it to pander more and more to sectional interests – like the SCs/STs/OBCs – the three wings of the State – the activists in the Judiciary, the Legislature and the Executive – have stoked and justified the worst instincts of each other to produce the excesses in which the polity is trapped today.

As a consequence, what were *enabling* provisions have become mandatory provisions. Indeed, they have become mandatory minima! That the provision mandating the removal of discriminatory laws and regulations shall not stand in the way of the State taking special measures for lifting the downtrodden became first the duty to take special measures. That became the duty to reserve jobs for those who would not qualify on their own. That became a *right* to be considered for higher posts also. The right to be considered for the higher posts has become a fundamental right to *occupy* those posts. The result is that if, during the course of writing his annual assessment report about Y, who happens to be an SC/ST/OBC, X says that Y does not deserve to be promoted, X is trampling upon the fundamental right of Y. Hence, a very heavy presumption falls upon X which he must discharge to the satisfaction of Y and his champions that he, X, is not propelled by an anti-SC/ST/OBC prejudice.

Nor are we anywhere near the end. An entirely predictable sequence has been enacted again and again. Induced to pander to yet another section, the Executive and Legislature have often passed a law pleading helplessness – “*Bhai, vote ka takaazaa hai, itni baar samjhaane pur bhi tum samajhle nabin*” – and saying in private that the courts will strike it down in any case. But by the time the courts have struck down the law or Government circular, the need to pander has climbed even higher so that the Executive and Legislature have just ignored the judgments, indeed they have gone farther and amended the laws and even the Constitution to get over the dykes that the courts had tried to save.

Make-believe

We comfort ourselves: at least, the virus of reservations has not got into judicial appointments; at least, reservations have not been

extended to Muslims and Christians. Both notions are just make-believe.

As the Bihar case illustrates, in several states – Gujarat, Haryana, Karnataka, Jharkhand, Rajasthan, to name a few apart from Bihar – appointments to the lower judiciary are already based on a quota system. In states such as Tamil Nadu, where formally there is no quota system, by convention governments allocate posts in the lower judiciary among different castes. Nor is the impact of this practice limited to what we call the “lower judiciary”. The years a person has spent at that level become an important consideration while selecting judges for the higher levels. The case of one high functionary became quite notorious as he just would not let some appointments to the highest court get through till a particular person from a particular caste group was included among them. The mal-effects go beyond, far beyond mere selection of personnel. The whole universe of litigation gets darkened as litigants begin to look upon one set of judges as “our men” and another set as “their men”.

As for reservations not having been extended to members of religions that repudiate caste – Islam, Christianity, Sikhism – again, that is but make-believe. The Chairman of the Minorities Commission, my friend Tarlochan Singh, sends me a list of fifty-eight castes and of fourteen tribal groups Muslim members of which have been given reservations. Even those who convert to one of these religions, continue to remain entitled to reservation. The rule in Tamil Nadu is that if the name of the father falls in the lists of Backward Castes/Most Backward Castes/Scheduled Castes/Scheduled Tribes, then, even if the person has converted to another religion, he remains entitled to reservations. In Gujarat, members of Backward Castes continue to avail of not just reservations but even of advantages under the Roster System after conversion – 137 castes and sub-castes have been listed as socially and educationally backward in the state; of these, 28 belong to the Muslim community. In Karnataka, “caste *at birth*” is the norm. In U.P., several Muslim castes are included in the reservation lists – Lalbegi, Mazhabis, even Ansaris. The position is no different in Madhya Pradesh, in West Bengal. *The Indian Express* correspondent in Kolkatta reports that the Government of the ostentatiously secular CPI(M) strained to have reservations in government service as well as educational institutions extended to Muslims *qua* Muslims, and

directed the state Minorities Commission to ascertain how such reservation had been decreed in Andhra Pradesh. The plan has had to be deferred for the time being, he writes, only because the Andhra High Court has struck down the Andhra order as unconstitutional.

Even as moves are afoot to get the Andhra judgment reversed, the Government has directed the Armed Forces to count soldiers and officers by their religion. Nor is this move an inadvertence. It has arisen as a result of a committee that the Government has appointed under a former Chief Justice of Delhi, Rajinder Sachar – each member of which has been carefully selected for his “secular” beliefs. Each term of reference on which it is to supply information and make recommendations, as we noted at the outset, has been just as carefully selected to justify reservations and other concessions to Muslims as a religious group.

With elections looming, in January 2006, the Government of Kerala announced another “package” of reservations for backward castes and for Muslims: service rules of the state shall be altered to permit direct recruitment of these sections so as to fill the 40 per cent quota that has been set aside for them; if suitable candidates are not available from these sections, the vacancies shall not be filled by merit; the state Public Service Commission shall prepare an “additional supplementary list” so that the vacancies may be filled only by these sections; 20 per cent of the seats shall be reserved for these castes in graduate and post-graduate courses in government colleges; the Chief Minister will himself monitor the implementation of the reservation policy; there shall be a permanent Commission to ensure that reservations are fully filled...

With elections upon them, the DMK and its allies announced in Tamil Nadu that, once in office, they will bring forth legislation to give reservations to Muslims and Christians.

The Jharkhand Government, in turn, has announced that members of 32 tribes that are the most backward – literacy level among nine of them is said to be just ten per cent – shall be directly recruited into government service; those among them who pass the graduation examination shall not have to take the qualifying examination which all others who enter government service have to take.

And beware, the progressive judges have already put out the basis for extending reservations to Muslims or Christians as Muslims and

Christians. The word that the Constitution uses is "communities", the word it uses is "classes", Justices Jeevan Reddy, Sawant and Thommen hold in *Indra Sawhney*. "Community" and "class" are wider than "caste", they say. So, entities wider than "caste" can certainly be subsumed under them, they say – the only proviso being that the groups so identified be "backward". Second, in spite of the teachings of Islam, Christianity and Sikhism, castes persist in these religions also, they explain in justification. As that is the reality, it would be invidious to restrict access to reservations to the backward sections of Hindus alone...¹

As we have seen, the 93rd Amendment has over-turned the decision of the Supreme Court, and given power to the state governments to specify a proportion of seats that even private colleges which are receiving no assistance from government must reserve. The Ministry of Human Resource Development has followed that up by decreeing that the IITs and IIMs, among the last few islands of excellence, must also set aside 49.5 per cent of their seats to be filled by birth rather than by merit.

And it is more than reasonable to forecast that before the next elections, as a run-up to them, the present coalition will introduce a Bill to extend reservations to the private sector as a whole. The Law and Social Welfare Ministries are reported to have already taken the position that reservation can be extended to cover the private sector by changing Article 19(1)(g), passing a law mandating it and putting the law in the Ninth Schedule – thus putting it, like the Tamil Nadu law decreeing 69 per cent reservations, beyond judicial scrutiny. When the matter comes up for vote, every political party will issue three-line whips to make sure everyone notices that it is as committed to reservations as the ruling coalition...

Inexorable

There is an inexorability about such a juggernaut, an ineluctable inner logic:

- Introduced as an exception, the measure swallows the rule;

¹See, for instance, *Indra Sawhney v. Union of India*, *op. cit.*, at 370, 385, 533-35, 440, 447, 463, 712, 716, 727, paras 34, 83-87, 89-92, 267-68, 282, 323(5), 474-78, 777, 782, 796-97.

- ❑ Given as a concession to one, perhaps deserving group, it is grabbed by one group after another, by one progressively more undeserving group after another – recognition of Jats as a backward caste has set the stage for complete Mandalization of Rajasthan, a conscientious civil servant reports; Gujars have begun demanding, “If such a strong community as Jats are backward, why not us?”;
- ❑ Introduced in one sphere, it spreads to others, exactly as a cancer cell taking root in one organ multiplies and invades others;
- ❑ In its application to the original group, as well as in its appropriation by others, in its application to the original sphere as well as in its extension to others, the measure suffers progressive, rapid debasement;
- ❑ A concession becomes a right, a ceiling beyond which it is not to be given becomes the floor – the level which it is the right of everyone who can grab to have;
- ❑ The floor, the minimum which everyone takes to be a right becomes the base from which one should wrest more;
- ❑ A concession once made cannot be retrieved, a standard once relaxed cannot be restored;
- ❑ At first efforts are made to arrest the rotting, to ensure that the measure adheres to the purposes for which it was meant, to pare away the manifest excesses; some brave souls even attempt to introduce an element or two of reform; the juggernaut crushes the attempt, and soon even the effort at reform is abandoned, even the pretense that what is being done has some nexus with the objective for which the exception was originally made is shed;
- ❑ Guardians, such as the courts, who are meant to ensure that the exception shall subserve the end for which it was meant, instead take to rationalizing the advance of the juggernaut;
- ❑ What was meant to be a temporary exception thus becomes a permanent millstone, in the end one that pulls the entire society down.

The Communal Award was such. Caste-based reservations have been such.

Government work

Half the entire State structure is thus to be manned by persons who are by definition not qualified for the job.

"*Arey bhai*, but what is government work?," one of these leaders asked me, I reported at the time, as he and his colleagues rammed Mandal down on the polity. "It is just pushing files."

That is what we have made it. And that is one of the major reasons on account of which the State apparatus has fallen so far below what is required.

Just "pushing files"?

Governance is not "just pushing files".

Government impinges on every aspect of our existence, it is vital for many aspects, in fact in regard to many of them everything turns on how well the structure of the State performs.

Fighting terrorism? From among the DSPs, will you promote 'X' as SP and put him in-charge of operations because he has the expertise to counter the terrorist or because he belongs to sub-caste 'Z' which falls in Group B of the Backward Castes list and the post that is to be filled is number 9 on the Roster, the number 9 which, in accordance with the Roster, is reserved for a person from sub-caste 'Z'?

Look around the world and see the hurricane-pace at which new products are coming up, at which new technologies are erupting. For good or ill, in societies like ours the State is an important factor in determining which products will be encouraged, which discouraged, which technologies will be adopted, which not.

Does that not require specialized, up to-the-minute knowledge? Will you select persons because they were born into this caste or that; or on the basis of their competence in assessing the technologies?

"But do you mean the existing fellows have it?"

Assume they don't.

Isn't the answer to this lacuna that we institute selection procedures and promotion criteria which will ensure that only those who *do* possess the expertise get the posts? Or is the answer that, as the existing ones don't have as much expertise as the tasks require, let us stuff half the posts with persons who by definition do not have the expertise, let us promote persons because they belong to this sub-caste rather than that?

Only for "super-specialities"?

Nor is the need for expertise and excellence limited to one or two ministries. It is the imperative in every nook and corner of the State structure. Borrowing in international markets, assessing weapons systems for the defence services, assessing the environmental impact of the Tehri Dam, assessing products to determine whether they are carcinogenic, assessing the relative merits of atomic vs. thermal vs. hydroelectric power plants... These are *routine* functions of ministries today. Which of them does not require expert knowledge?

How is treatment of cancer, or operating on the liver, or replacing knee-caps or hip-joints... how is any of these less in need of specialization and expertise than the instances that the Supreme Court had listed for illustrative purposes? How is the management of the hospital in which such surgeries will be performed less of a speciality? *A fortiori*, how is the ministry that shall control, or direct, or intervene in the affairs of all the hospitals taken together less in need of excellence and expertise?

In which arena will "pushing files" suffice in this day and age?

And notice too that we are no longer a conglomeration of isolated, self-sufficient "village republics". The structure – of the economy, of the State – is organically interlinked, interdependent. You can't have substandard functioning in one area – the management of our economic relations with the rest of the world, say – or casteism in one department – the police, say – without the entire structure getting enfeebled and incapacitated to that extent.

Compelling merit to stay away

With half the positions reserved at the time of entry as well as in promotions, those with merit will *stay away from* government as well as from every institution with which it has anything to do. For the meritorious will certainly know that, even if he makes it to the general pool at the point of entry, his career may be stalled, indeed derailed at any point if he does not happen to be from the caste or sub-caste from which alone post number nine on the Roster can at the precise conjuncture of time and place when his promotion falls due be filled.

"But do you mean backward caste boys and girls just do not have talent and merit?"

Not at all.

The point is not that there is something genetically wrong with anyone. But that *at this time* the group we are talking about – and that group is not "boys and girls from the backward castes," but "boys and girls from these castes who have got the jobs because those jobs are reserved" – the point is that *at this time* they are not *by definition* qualified for the job.

This is evident from the two facts which we have noticed in the foregoing:

- These are the persons who do *not* qualify on merit; those who do, are *not* to be counted against the reserved quota;
- These persons continue to need reservations to advance in their careers; that is the reason why the Mandal Commission insisted that there be reservations not just at the point of entry but in promotions also, and that is why the Constitution has been amended to ensure this. That is why reservations are demanded, and have been secured not just in under-graduate courses but also in post-graduate ones.

So, *at this time* they are not qualified for the job. And that job has to be done *now*.

Breaking the structure

Nor are the mal-effects going to be limited to the fact that the meritorious will be discouraged from even seeking to enter government service, that they will be excluded from half the jobs in it should they be foolish enough to still seek to enter it.

Services and departments are bound to rupture, and have already fractured in many a state along caste lines. And as the scheme will apply to all government services, all governments, the fault-lines will extend beyond the individual department or ministry. They will fracture the entire structure.

A police official orders firing... Five are killed... His fate will depend on whether his superior is from his caste or from one that is hostile to his caste, on whether the officer in the Home Department is from this caste or that ...

Fanciful? But that is what things have already come to in a state like Bihar.

There is another, and equally enervating consequence of such schemes.

A job should be something one has to work to get, something which one has to do one's utmost to retain and advance in. The job should not be, advancement in it must not be anyone's by right.

But the ethos which reservations foment is exactly that the job, the promotion is someone's by right, and that because of his birth, not work.

How can a modern society survive, let alone grow with this as its ethos?

How are they helped?

"I am definitely against reservation in Government services for any Community for the simple reason that the services are not meant for the servants but they are meant for the service of society as a whole..."

A pregnant remark. From Kaka Saheb Kalelkar's letter forwarding the report of the First Backward Classes Commission.

It bears reflection. For so many bleeding-heart liberals, to say nothing of the hypocrites who snatch at anything that might be made to appear a progressive plume, so many of them are misled into supporting ruinous schemes such as the present one merely because they are said to be for the "Backwards".

We have already seen that the sections to whom the scheme is being made available are not "Backward". They are the dominant, the prosperous sections. But assume for a moment that we are talking only of the genuinely "Backward", of say the poor.

A steel mill is set up. What is the best way to help them? By ensuring that it is manned by the ones who are the best and truly qualified for executing the tasks it requires, and is thereby run at optimum capacity? Or by decreeing that half of the jobs in it must be packed with persons who are *by definition* not qualified to man them, and thereby having it work at half its capacity? And to be soon pushed into bankruptcy by lower cost mills of China?

In fact, I will be surprised if a steel mill, or a continuous-process chemicals plant can be made to function at half its capacity with

half of its personnel selected on the basis of their birth rather than on the basis of their ability to do the job here and now.

The worldwide clients of Wipro, of Infosys, of TCS; the automobile firms that are turning to India for designing and producing their components – why will they come to India if half the employees in these firms have been selected because of their birth, and not because they are the very best?

“27 per cent of one per cent”

“Arun, why are you so upset? Central government employment is only one per cent of total employment. Giving 27 per cent of one per cent is not going to bring down the heavens”.

It was one of the best persons we have had in public life, the then Finance Minister, Mr. Madhu Dandavate, as we ran into each other at a Rashtrapati Bhavan reception at the height of the agitations against the decision of the V.P. Singh Government to ram Mandal down everyone’s throat.

I was deeply saddened.

Not only because he prefaced this with the remark, “Not all of us can have your courage” – even though I knew of course that he was just mocking me, and not saying anything about himself or his colleagues.

Not only because he of all persons surely knew that the effect of packing half the jobs in the structure of governance was to introduce a new virus – and in a massive dose – that will incapacitate the entire body.

But because the argument actually proved the opposite.

After all, how was 52 per cent of the country’s population going to be materially helped by being given 27 per cent of one per cent of jobs?

And that is exactly the argument that has gained currency since then – so that today the political class is on the verge of decreeing reservations in the private sector also.

Society itself

Indeed, the consequences transcend the economy, even the State. They rend society itself. For the scheme gives entire communities, and

lethally aggressive communities at that, an interest in perpetuating, nay sharpening their separateness.

Reservations in legislatures on the basis of caste. Seeking votes on the basis of caste. Just these two things and we have seen how they have reinvigorated casteism throughout the length and breadth of our country.

The move marks a societal regression in another way also:

- Individuals are to get advantage because they are members of a group;
- Not just because they are members of *any* group, but because they are members of a caste;
- And the advantage they are going to get is to be better able to grab at the State.

Each of these features has debilitating consequences.

When one secures a gain not because of what he does but because he is a member of a group, he works to strengthen that group.

And, as Mancur Olson has shown in his vital work, *The Rise and Decline of Nations*, such a group is *anti-the whole*. As he shows, it is just *not* rational for members of the group to devote themselves to the interests they have in common with the rest of society. If they did so they would have to take on the whole or a disproportionate share of the cost of realizing those interests while securing only a small part of the benefits. The interests that are most profitable for the group to pursue are those which are exclusive to its members. (The calculus holds true for the atomic individual *a fortiori*. But he cannot as an individual impede the structure the way the group not just can, but ever so often does.) When such groups multiply and acquire power, society is immobilized. It is locked in countervailing rigidities.¹ Britain of the nineteen fifties, sixties and seventies. France more recently. The effect of many of our trade unions in our industry in the nineteen eighties, of caste and religious groups on our polity today.

¹Mancur Olson, *The Rise and Decline of Nations*, Yale, New Haven, 1982. The situation over several swathes of the country has deteriorated so much that by now the analysis in terms of "stationary bandits" as against "roving bandits" Olson presented in *Power and Prosperity*, Basic Books, New York, 2000, rings closer to the facts!

And this at the precise moment when innovation, adaptability, nimbleness are what our society, our economy, our State need.

Indeed, the interests in this case are not just exclusive to the members of the group, they are explicitly *at the expense of* the rest in society, for the jobs the members of the group get are jobs that others are excluded from.

And this at the precise time when harmony, a coming closer, is what our country so desperately needs.

Worse, the group which the citizen is propelled by the policy to fortify is not just *any* group. It is his caste *qua* caste.

The very thing everyone, the progressives most of all, has been screaming is the curse of our society.

And then there is the nature of what he is being given. What he is being given for being a member of the group, the caste, is not, say, a once-over cash prize. He is being given an office of State. That intensifies the notion that the State, that everything in it, that everything that flows from it, that everything that can be *made to* flow from it is one's to grab. Has this notion of the State not already contorted the structure to dysfunctionality?

And now the notion is to be spread beyond the State structure...

The other way

For thirty years, each concession, each relaxation of standards, the inclusion of each new caste in the reservations list has been decreed with just one thing in mind – the vote-banks to whom “the right signal” needs to be sent. The progressive judge can’t be bothered, indeed he sees merit in this pandering to the newly risen. “Sometimes it is obliquely suggested,” we are instructed in *Vasanth Kumar*, “that excessive reservation is indulged in as a mere vote catching device. Perhaps so, perhaps not. One can only say ‘out of evil cometh good’ and quicker the redemption of the oppressed classes, so much the better for the nation...”¹

And that is of a piece. Our political class just throws a concession at some group, it just throws funds at some problem or region, and proclaims itself to be the champion of the poor and neglected. In states such as Jammu and Kashmir, in the Northeast, Delhi has deluded itself into believing that it has “done its duty” by pouring money into them. The money has ended up financing insurgents. But if you point that out, you are accused, “He is anti-Kashmiri, he is anti-the people of the Northeast.” In regard to the Public Distribution System, the political class has made itself believe that it has done its duty by the poor because it has dispatched grain to the ration shops – even as the Planning Commission publishes reports that 30 to 100 per cent of the grain and sugar end up in the open market.² Nor is that confined to the Public Distribution System. In the same *Midterm Appraisal*, the Planning Commission pointed out that the overall amount being spent on the principal poverty alleviation programmes excluding the amounts spent on many other sectors

¹Justice O. Chinnappa Reddy in *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 752, para 58.

²See, for instance, Planning Commission, *Midterm Appraisal of Ninth Five Year Plan, 1997-2002*, Government of India, October 2000, p. 163.

such as infrastructure and social welfare at the time was around Rs. 40,000 crore a year; that the total number of poor families in the country being approximately 5 crore, the amount that was being spent per poor family was roughly Rs. 8,000 per annum. The Commission added, "Even assuming that each one of the 5 crore families were completely penniless and had no other source of income, they could buy every day 3 kg. of foodgrain with this money from the market at the rate of Rs. 7 per kg. and thus come above the poverty level."¹

But the moment you question these schemes, the moment you even quote official reports that state that the Public Distribution System is the least cost-effective ways of attacking poverty, you are denounced as being anti-poor.

The story is exactly the same in the case of reservations. Reservations should not be allowed to become a vested interest, the Supreme Court stated in *A. Pariakaruppan*. The efficacy of the reservations policy will consist in how soon reservations can be done away with, it stated in *Sosbit Karamchari Sangh*. "The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so," the then Chief Justice, Y.V. Chandrachud, counselled in *Vasanth Kumar*. But today if you so much as inquire, when reservations may end, you are bound to be traduced as anti-Dalit, and worse.

Are only a few sub-castes hogging the seats reserved for Scheduled Castes and Tribes? Are castes being added to the list of Backward Classes because they are deprived or because they are so powerful that politicians today just have to pander to them? If today, thirty-five years after the Supreme Court directed the Executive to always keep a watch on who is wresting the advantages from reservations, you ask, "What percentage of the seats in the general pool are going to castes for which there are reservations?" there is no answer. On the contrary, there is the charge: "This is all a conspiracy to cast doubt on the whole policy of reservations and thereby snatch the meager benefits that have been secured by the backwards after untold sufferings and endless struggles."

¹*Midterm Appraisal of Ninth Five Year Plan, 1997-2002, op. cit., p. 483.*

This descent, or, if you prefer, this progression to lower and lower standards, to the poorer and poorer functioning of the State and, therefore, to its increasing inability to discharge its duties *vis a vis* the poor as much as towards anyone else, the debasement of public discourse and, therefore, the progressive inability to arrest the descent is as inevitable as it is predictable. The consequences are before us in

- ❑ The type of person who is now making it to our legislatures;
- ❑ The collapse of norms and standards in our educational institutions and our civil services;
- ❑ The splintering not just of the electorate, not just of legislatures but of the services along caste-lines;
- ❑ A generalized assault on excellence.

Ortega Gasset comes true: standards are dismissed as elitist; mediocrity has become the norm; vulgarity is authenticity; intimidation is argument; assault is proof...

This way, as Panditji pointed out decades ago, lies not just folly but disaster.

What should be

The way to climb out of the abyss is manifest.

No status, no job, no post, no position, no concession should be accorded to anyone by virtue of her or his birth, caste, creed, religion or race.

Indeed, none of these should be given to anyone as an entitlement, as a matter of right. Each of these must be something for which we have to strive.

That holds true of governmental posts most of all. True, the sovereign remedy today is to continue to reduce the role of the State in our lives. That has been the running theme of Reforms since 1991, and we can glimpse the efficacy of this remedy in the way economic progress has accelerated during the last fifteen years. But there are minimal functions that only the State can perform. These require competence and sustained application – as much as work in any other sphere requires them. And the work that falls to the State today has to be done *today*, it has to be done *here and now*. That someone has the potential to eventually learn to execute that work is no substitute –

for, if he is given that job today as an entitlement, as a matter of right, and he does not have the competence to do it well *today*, that vital job will remain undone or will be ill-done, and the country will suffer. It will suffer not just directly – by the fact that that particular job will be ill-done. It will suffer even more, indirectly – the State will get delegitimized, the virus of mediocrity will take root.

So, no status, no job, no post, no position, no concession should be accorded to anyone by virtue of her or his birth, none as a matter of right. Our scriptures contain enough admonitions to the effect that a person is to be known by her or his conduct, not by their birth. In his scholarly works, Arvind Sharma has shown in addition that there was great mobility and elasticity in the caste system even in ancient times – there were kings from all castes; there were savants and teachers from all castes; there were Brahmin armies, Kshatriya armies, Shudra armies – Chanakya valued Shudra armies all the more; the Brahmins are too easily propitiated, he observed.¹

In any event, any passage in any scripture that fixes status or occupation by birth, must be jettisoned. An assertion that differentiates persons by birth, colour, race flies in the face of the doctrine central to our religion – that is, the proposition that each being has a soul and that this is identical in all.

The caste system can be re-interpreted in this sense – Gandhiji's numerous writings on caste testify that doing so would in fact not be "re-interpretation"; it would be to restore the caste system to its original meaning: a system purged of notions of superiority and inferiority, an inclusive system, a system imbuing people with a sense of duties towards each other rather than one prescribing taboos and superstitions.

And it is also the case, as Mark Tully points out in *No Fullstops in India*, that even today the caste system provides millions of individuals with a sense of identity and security. It is true that many castes have a tradition, one that is visible to this day, of providing assistance to members of the caste, and that this tradition of solidarity has been an important spur to advancement of members of these castes. Professor R. Vaidyanathan of the Indian Institute of

¹Arvind Sharma, *Classical Hindu Thought, An Introduction*, Oxford University Press, New Delhi, 2000, pp. 132-80; Arvind Sharma, *Modern Hindu Thought, An Introduction*, Oxford University Press, New Delhi, 2005, pp. 126-70.

Management, Bangalore, points to this tradition of mutual assistance as being one of the secrets behind, for instance, the phenomenal success of Gounders in Tirupur in the garments industry, of Nadars in Virudhnagar area in the match-making and printing industries. He points to the way members of these communities as also the Marwaris, Sindhis, Kutchis, Patels help each other – their willingness to extend credit, the strong networks of the communities, their contract enforcement mechanisms, the way their members encourage and assist each other to take on risks and how they stand by each other in case of failure. Vaidyanathan concludes from such instances that in India “caste is vital social capital,” and that a key way out of the problem is to help SCs/STs, OBCs become “Vaishyas” – that is, to help them become entrepreneurs by extending bank credit and other facilities that they need for setting themselves up in business.¹

So, the system has its uses. So, it is possible to re-interpret it in modern terms. But by now the caste system has got so overlaid by history, by now several practices associated with it or advanced in its name have become so harmful as well as so mulish that it is better to jettison it all together.

And the fact is that it *was* and *is* being erased by modernization. Just twenty/thirty years ago, observers were writing about the elaborate rules which governed the hands from which a high-caste person may accept food or water: does anyone go about finding who is working in the municipal water works, who is cooking the food that is served in the stall from which he eats? Thirty/forty years ago, the observers set out, with some glee, the number of times a Brahmin in the South had to bathe if so much as the shadow of a *Harijan* fell on him. Does anyone – Brahmin or not – ascertain the caste of the man pressing against him in our jam-packed buses and trains? To which category in that fourfold division with which these observers traduced us and our culture do the modern professions correspond – journalism, engineering, IT, environmental remediation, medicine?

So, caste was and is indeed being erased by modernization. It has been given a new, diabolic lease of life by two general factors – electoral politics and State policies – and, within these, by three

¹See, for instance, R. Vaidyanathan, “Caste as social capital,” 10 April 2006, http://newsinsight.net/columns/full_column22.htm.

specific ones. As politicians have been less and less able to commend their case on the basis of their performance, they have pandered to sectional, specifically caste groups; second, many have concluded that the one sure way to channel governmental outlays and other patronage towards themselves is for them to organize themselves by some sectional identity; third, reservations.

Those who are disadvantaged must be lifted, of course. But the help must be of a particular kind: it must consist of positive measures which raise their standards and equip them to out-compete the rest. It must not take the form of a lowering of standards nor of blocking posts and positions.

To identify those who are to be helped, the individual must be the unit of State policy, not a group.

To identify the individual, her or his income or assets, educational deprivation – that is, purely secular criteria – must be the yardsticks, not caste or religion or race, etc. Why is it that the “economic criterion” is accepted when it comes to determining access to the Public Distribution System, but the moment it is proposed for reservations, the shout goes up, “A conspiracy to divide the backwards”?

There is the conclusive reason that we have already encountered in the case of separate electorates for sticking to secular criteria: politics congeals around whatever criterion is selected for State policy and programmes, interests get vested around it, ultimately power. And there are additional reasons – in law, and in fact. As happened in so many matters, that simple and good judge, Justice H.R. Khanna voiced in words true and straight the caution we must bear in mind. While some of his colleagues on the Bench handling *N.M. Thomas* were sweeping themselves off their feet by their own prose, he wrote with his customary diffidence,

I may state that there is no dispute so far as the question is concerned about the need to make every effort to ameliorate the lot of the backward classes, including the members of the Scheduled Castes and the Scheduled Tribes. We are all agreed on that. The backwardness of those sections of the population is a stigma on our social set-up and has got to be erased as visualized in Article 46 of the Constitution. It may also call for concrete acts to atone for the past neglect and exploitation of those classes with a view to bring them on a footing of equality, real and effective, with the advanced sections of the population. The question with which we are concerned, however, is whether the method which has been adopted is

constitutionally permissible under clause (1) of Article 16... The answer to the above question, in my opinion has to be in the negative... We have also to guard against allowing our supposed zeal to safeguard the interests of the members of Scheduled Castes and Scheduled Tribes to so sway our mind and warp our judgment that we drain off the substance of the contents of clause (1) of Article 16 and whittle down the principle of equality of opportunity in the matter of public employment enshrined in that clause in such a way as to make it a mere pious wish and teasing illusion. The ideals of supremacy of merit, the efficiency of services and the absence of discrimination in the sphere of public employment would be the obvious casualties if we once countenance inroads to be made into that valued principle beyond those warranted by clause (4) of Article 16.¹

Justice A.C Gupta concurred, and recalled the warning that Justice Gajendragadkar had voiced in the context of Article 15(4) – namely, that in justifying steps in pursuit of one ideal we should beware lest we trample upon other ideals enshrined in the Constitution. In *M.R. Balaji*, Justice Gajendragadkar had observed,

When Article 16(4) refers to the special provision for the advancement of certain classes or Scheduled Castes or Scheduled Tribes, it must not be ignored that the provision which is authorized to be made is a special provision; it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of society. It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Article 15(4) authorizes special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4) the Parliament intended to provide that where the advancement of the backward classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored.²

Precisely, and yet an understatement. The Constitution has asked that “special measures” be taken for the upliftment of the weaker sections

¹*State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 at 400-01, para 221.

²(1963) Supp. (1) SCR 439; AIR (1963) SC 649.

of our society. But the "special measures" have been reduced to "reservations". That word is waved to fool the poor. Whether it is the best way to help the poor; whether the benefits from it are reaching the truly poor – none of this is examined.

Justice Gupta also recalled what the Supreme Court had said in *State of Jammu and Kashmir v. T.N. Khosa*:

...Let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in wonderment: what, after all, is the operational residue of equality and equal opportunity?

"I believe," Justice Gupta concluded, "these words are not just so much rhetoric, but [are] meant to be taken seriously."¹

In a word, all our countrymen must be lifted out of privation. Inequalities that arise from birth must be minimised. But the history even of the last hundred years shows that there shall always be inequalities in every human group. Indeed, it shows that the regimes, movements and individuals who have shouted the loudest against inequalities, who have most stridently proclaimed their resolve to institute equality, are precisely the ones who have established, and brutally perpetuated regimes which fomented the most brazen and vicious forms of inequalities. And it is the rhetoric advocating equality that was made the justification for snuffing out other values – liberty and elementary freedoms being among them. In our case, as Justice Khanna's observation portends, that contrived passion will erode other ideals and goals enshrined in the Constitution.

Privation must be erased. Inequalities based on birth must be minimised. This is best done, as the framers of our Constitution envisaged, by outlawing, on the one hand, discrimination and ostracism, and by providing, on the other, positive help which will equip the disadvantaged to outdo others.

The amelioration will necessarily be a gradual process. Hastening it will disable the State from discharging its minimal functions. And it will inevitably end up merely replacing one set of privileges by another.

¹*State of Kerala v. N.M. Thomas, op. cit.*, at 405-06, para 232.

To individuals who have been identified as disadvantaged by economic criteria, the fullest help that the State can afford must be given so that their standards may be raised – free and extra tuition, subsidized and extra nourishment, residential accommodation, whatever is needed. But at the starting point for any job or post, ability to perform the work that has to be done, to accomplish it here and now must be the singular criterion.

After entry, and throughout the career, performance and whether the person has the abilities which that level or the next level requires alone should govern continuance and advancement.

At the point of entry as well as at every subsequent post of advancement, the standards must be those which the proper discharge of duties at that level requires.

These should most certainly be appropriate to the job, they should test the person in the abilities that are needed for the job; if necessary, the methods of assessment should be continually honed so that more and more appropriate persons are selected.

But at no time and at no level should the standards in force be “relaxed”.

Whatever the standards which have been retained as the best available at that moment, must be applied, they must be applied equally to all, and strictly to all.

And whenever any assistance is given – in this field or any other – the State, and, even more so, informed sections outside the State apparatus must keep a close watch over the measures – over the extent of benefits they are yielding, over who is benefiting from them – and publish the results.

Prerequisites

For any of this to come about, three things are necessary.

First, as our review shows, judges must reflect on the encouragement they have given to the worst instincts of the political class:

- ❑ They must reflect whether they have not been swayed by intellectual fashions of the day.
- ❑ They must look beyond the case at hand, and envision the meta-consequences of their decision, and, as the examples we have

encountered show, they must reflect on the meta-consequences of their grandiloquent prose.

- They must revisit the premises that have propelled many a judgment, and reassess whether, given the direction in which the political class is hurtling today, they will best serve the country by being instruments of some imagined revolution or by *conserving*.
- All that the revolutionary proclamations of those progressive judges who fancied they were working a revolution accomplished was to provide a rationalization for what were manifest departures from the scheme and spirit of the Constitution. These in turn provided rationalizations for the worst instincts of the political class. Even in the 1960s, what were needed were pronouncements that would make the political class pause and reflect, not fanciful phrases that would cheer it on. This role of restraining is infinitely more necessary today – when the political class is so set in the wrong direction; when it is so splintered that any little posse can push it farther in that direction; when it has become so cynical that, even as its highest representatives state in private that the measure before them will harm the country, they don't just vote for it, they make sure that all concerned notice that they are voting for it. In a word, to *conserve* has always been the proper role for the judiciary. It is an imperative today.
- The liberals among them must review the premise that has so often governed their judgments: that temporizing will assuage the political class; that by going half-way, they will persuade the political class as well as the revolutionaries on their own Benches to desist from going farther. As the five year stay that was accorded in *Indra Sawhney* shows, as the legal opinion that was given in regard to dilution of standards shows, the political class will use every aperture, every qualifying phrase to overturn the entire scheme that was envisaged, and push its convenience of the moment.

Second, those who see the abyss into which the political class has pushed the country, and who aim to do something about it, must learn from the casteists. They are, not just aggressive, they are, within legislatures as much as outside, in services as much as outside, well organized. They act as a block, indeed as a fist. And, therefore, every

political party has to bend to them. On the other hand, in state after state, I find the same pattern. Ever so many are alarmed at the direction in which the political class is hurtling the country. They are alarmed at the extent to which society has already got divided along caste-fissures. But the only opposition that is being put up is by an individual here, an individual there.

Hence, those who are making the new India – by their innovations, by their hard work, by their striving for excellence – must speak up. They must *organize*.

Third, and most important, as we have seen, the principal reason for the descent is the alarming deterioration in the quality of persons in public life. In turn, that deterioration has been caused by many factors.

Structure is one of them. It is true, of course, that there is no structure that cannot be perverted. Equally, almost every structure can be put to do good. But structures and conduct react on each other. The smaller the constituency, for instance, the easier it is for someone who sets himself up as the leader of a caste to prevail, and, therefore, the greater is the incentive for him to inflame and frighten that narrow group. Conversely, if all of India were one constituency – for instance, if the head of the Executive were to be directly elected – there is no caste by inflaming which anyone could succeed.

One important cure, therefore, is to think through alternatives to the present structure.

The pre-prerequisite

But to even commence that search, there is a prerequisite. Discourse must be liberated from cowardice. We must restore depth to it. So long as intellectuals, the media, to say nothing of the political class remain afraid of being dubbed “anti-poor” or whatever, when everything is reduced to the fleeting “sound-byte”, we will not be able to even begin the climb out of the present abyss.

Today, if you do no more than use the word that Gandhiji used, “*Harijan*”, and not the one that has been coined as a weapon in the politics of grievance-mongering, and to justify norm-less conduct – “*Dalits*” – you are a *Manuvadi*, and, therefore, by definition an oppressor who is in secret conspiracy to make millions untouchables again.

If you point to the truth about reservations: that they are a sleight of hand of the politician – instead of working to ensure better education, better hostel facilities, superior tuition for the disadvantaged, he gets posts “reserved”, and proclaims that he has brought boons for them; that these are “boons” in the most stagnant part of our society – namely, government service; that they have led to a perverse race, a jostling to get one’s group declared “backward”; that in several states, the reservations are being cornered by a few sub-castes; that the proportions of jobs that are now being reserved far exceed even the illustrative proportions that had been stated in the Constituent Assembly by Dr. Ambedkar himself – if you request even that these apprehensions be *examined*, you are part of the oppressor-regime, you are a *Manuvadi*, and are scheming to divide the oppressed to boot.

Initially all sorts of aggression was justified in the name of “class”. While it successfully silenced the rich, while it got the literati to start parroting the same verbiage, Communists and socialists soon found that “class” rhetoric was not enlarging their base. The way forward was out-and-out caste politics. But how were these progressives to adopt such a retrograde category into their platform? Hence, the breakthrough formulation: “In India, caste is class”! And, as we have seen, that convenient super-imposition was picked up by the progressives in the judiciary itself.

Since then “social justice” has been the great rationalization of every step to pander to sections, in particular to castes and “minorities”.

Bosses who control such groups are, *ex officio*, exempt from all norms. Their vulgarity is authenticity. Their ignorance of affairs of State is precisely what makes them *like the people*. Whosoever talks of exactions by them and their relatives, does so only because they are from the lower castes, and he can’t stand their being heads of government! Today no officer, even if he has conclusive proof of wrong-doing by an officer who got in through the reservation route, dare say so even in the annual Confidential Report lest he himself be charged with “hostile attitude towards SCs/STs.”

As has been stressed repeatedly, there cannot be any doubt at all that those who are disadvantaged must be helped. But today all that is being done is to pander to groups to buy votes, and to dress this

pandering up as "social justice". That moment when, frightened of a rally, a politician – one whom his closest associates did not remember having so much as talked of the matter earlier – lunged for Mandal is the true symbol of the times. As is the avalanche which is sent hurling down on even the minutest effort to deport illegal Bangladeshi infiltrators.

"Social justice" has thus resulted in a moral and mental paralysis. Labour laws? Dare not touch them as you would be injuring poor workers – even though organized labour is the aristocracy of the Indian working class: specially so the workers in public sector units, their pay and allowances being higher than those of workers in private units! The Rs. 45,000 crore that are currently spent on subsidies every year? Dare not question them as you would be kicking the stomachs of the poor. Free power? Dare not say anything against it as you would then be against the poor farmer – even though the poor farmer is not the one who gets such power as reaches the village, even though farmers are willing to pay for power if only they get reliable power. Minimum Support Prices? You dare not question them as you would then be anti-farmer – even though these prices are benefiting farmers in just four states, even though, even in these states, they are keeping the farmers from diversifying into higher-value crops. PSU corpses kept on artificial respiration? Dare not say anything about them – for then you are against hard-working labourers who, with their blood, sweat and tears have built the "temples of modern India" – never mind how the country, and therefore the workers themselves, would be so much better off if the resources that are locked up in these units were put to more productive use. Sugar subsidies? Dare not touch them – even though they perpetuate the growing of this water-intensive crop in drought-prone areas of Maharashtra, even though the subsidy benefits the mills and keeps them inefficient to boot, rather than the cane-growers. Fertilizer subsidies? Dare not reduce them – even though times without number it has been shown that they are being cornered by mills and not being passed on to farmers, even though by subsidizing chemical fertilizers we are encouraging farming practices that harm our soil, that poison our food. Subsidies on kerosene? Dare not ask about them; if you do, you are robbing the poor of the fuel they use for cooking – even though everyone knows that the subsidized kerosene is being used

to adulterate diesel! Locating industries in uneconomic sites? Dare not question the policy for then you would be against the development of backward regions of the country – even though the concessions are repeatedly exploited by unscrupulous elements to escape taxes, even though in the long run the units are not able to compete because the location remains inappropriate...

It is not the general interest that has occasioned these programmes and concessions. Nor the need of the particularly disadvantaged. *Jiska daav lag gaya, usne kheenb liya*. And the agglomeration of these concessions is the “human face” of our policies. I have little doubt that if the total amounts that have been squandered, and are being squandered on such programmes had been used productively, the country would have grown so much faster and the poor themselves would have been far, far better off.

The economic consequences of such pandering are very important in themselves. The other consequences are far more injurious.

When a polity once accepts that this is the way to “look after the interests of the poor” – that is, by diluting standards, by making special concessions regarding outcomes to a group – it just has to go on extending, as we have seen, the ambit of dilutions and concessions. And no segment of the polity, no political party for instance, can resist the pressure to go on a hunt of its own for groups for which *it* will wrest concessions. It will issue whips to make sure that its legislators make enough of a show of support to convey “the right signal” – the signal that this party is as committed to that target group as any rival.

But even short of whips, the pressures that such blind worship of a chimera like “social justice” engenders, silence the one who might venture to state the truth. In April 1992, while responding to a discussion in the state Assembly, the then Chief Minister of Assam, Hiteswar Saikia admitted that there were 30 lakh illegal Bangladeshi immigrants in the state. Unless he withdraws that statement within 48 hours, thundered the head of the Muslim United Front, his Government will be brought down. Saikia immediately declared that he had never made the statement – though he had made it on the floor of the Assembly itself. Two years ago, the then Chief Minister of Kerala, A.K. Antony, one of the most upright of recent Chief Ministers,

warned that minorities were exacting too much in the form of benefits, that their organizing themselves into vote banks was bound to create a backlash. He was traduced no end. And eventually that statement cost him the Chief Ministership. Last year a tell-tale sequence was enacted again in Kerala. All of us remember what a great reformer Sri Narayana Guru was, and what a sea-change he brought to the lives of millions, in particular to the lives of the then untouchable Ezhavas. The SNDP is the Ezhava organization today. On 2 January 2005, at one of the most significant gatherings in the state, the congregation of the Nair Service Society, the General Secretary of SNDP, Vellappali Natesan said that the minorities were capturing all the benefits in the country in the name of secularism, that they were swallowing the majority, that a situation has arrived in Kerala when members of the majority can escape from this only by converting themselves or committing suicide. He blamed politicians for making the situation worse by hankering after vote banks. He asked the majority to come together. He narrated how, precisely because the SNDP and the Nair Service Society were striving to bring their followers together, they were being attacked day in and day out...¹ The account of this speech appeared in the papers on the morning of 3rd January. The afternoon was not over and an avalanche of denunciations was sent down on Vellappalli. He cares only for the rich in his community... He is fomenting communal hatred... He has no shame in making himself available to the RSS...

Where is the freedom of speech in such an atmosphere? How can rational examination survive such verbal terrorism? But those who hurl the denunciations do so to a well-honed strategy, to a clear aim: make an example of the person who speaks that fragment of fact and thereby frighten everyone else so that the claims of that particular group – “low caste”, “minority”, “labour” – are put beyond examination, in the verbal equivalent of the Ninth Schedule, so to say.

There is another consequence too – one that will tell on both the effectiveness of the State as well as on freedom within it.

What the *outcome* of what I do will be, depends not only on the opportunities I have, not only on my effort, but also on circumstance – for instance, the effort put in by others on that matter that day; much

¹ *The New Indian Express*, 3 January 2005.

as whether an item will make it to the front-page of the newspaper tomorrow depends in part on what else has happened that day. And the outcome depends on chance.

Today, as we have seen in the rulings of progressive judges, "social justice" is taken to mean that the State must guarantee equality of *outcomes* to all, indeed in many instances that it guarantee particular outcomes to members of particular groups independently of whether or not they make the effort that is mandated for that outcome – witness the way qualifying marks are lowered, sometimes to near nothing, for candidates from particular castes.

As one group after another is able to get on to the Schedule or wrest the label "backward", the spheres in which the State must intervene become larger and larger: witness the imminent prospect of reservations being extended to private enterprises. You would have noticed a curiosity: the very persons who habitually denounce the State as it seeks powers to maintain law and order, to fight terrorism, say, are the ones who demand that it discharge more and more functions to "abolish poverty", to deliver "social justice"!

These demands are being heaped on the State at a time when it is able to deliver less and less. Indeed, almost the only thing that is putting a limit to the concessions that political parties are ready to make to sectional demands is that the resources at the command of the State are limited.

The consequences are certain. Tugged and pushed, the State will lurch from one concession to another. As there are many groups that can claim that they deserve "social justice", and as their claims often conflict with each other, the State will often be paralysed – witness what has happened to administration and development projects in U.P. as a result of the conflict that has been stirred between Mayawati's "*Dalits*" and Mulayam Singh's "backwards". The leader of each group foments a zero-sum mentality, cheered, as we have seen, by many a judge, to say nothing of commentators. That mentality congeals into conviction as, aided by the paralysis that the rival claims to "social justice" have caused, the sum indeed does not grow as rapidly as it might – witness the stagnation in so much of North India.

Two apparently contradictory things happen simultaneously: on the one side, as it fails to live up to promises, the State loses

legitimacy; and, on the other, capturing the State becomes all-important. *All* means are, therefore, unleashed to capture the State – witness what is being used to win elections these days. And that contributes to intensifying the ills: the diversion away from growth; suborning of institutions; the flouting of rules and norms; thus the continuing de-legitimization of the State... As the State loses legitimacy, rules and laws are flouted with even greater abandon, institutions like the police and civil service are suborned even more brazenly.

All this while, there is the myth of democracy – that what is being done is “the will of the people,” that the rulers have “the mandate” to do what they are doing. High on “social justice”, there are legions of legitimizers – servants ever so civil to whoever happens to be in office; legislators; lawyers and judges; alas, many a journalist too.

We talk of “Freedom under the law,” we repeat “Government of laws, not men.” But what is law in such a circumstance? What protection can it afford against a demagogue who has donned the cloak of “a man of the masses”, who has bamboozled enough people for the moment that he is the messiah delivering “social justice”? What is the Constitution when it can be altered time and again by the majority of the moment?

Alas, as we have seen, even courts are not immune from such rhetoric. Injustices are exaggerated to legitimize what the politician has, for other reasons, found convenient. The advances that have been made, that *are daily being made* – the way modernization has been eroding caste, to cite the example we have encountered in detail – are resolutely ignored. Worse, norms that are absolutely essential for us to hold our own in the fiercely competitive world of today are thrown out of the window – and that too on the say-so of an opportunist of a politician.

Therefore,

- ❑ We should be alert to the way catch expressions – “the poor”, “the backwards”, “social justice” – are being used to undermine standards, to flout norms, to put institutions to work – not for the millions in those categories but for the ones who have fooled those millions with those catch phrases.

- ❑ Subject every claim – whether it is made in the name of “the poor”, “the backward”, whosoever – to rational examination.
- ❑ After it has been in effect for a while, subject every concession to empirical evidence.
- ❑ Shift back from the figment, equality of outcomes, to equality of opportunities.
- ❑ And in striving towards that, compel politicians to move away from the easy option – of just decreeing some reservations, etc. – to doing the detailed and continuous work that positive help requires, the assistance that the disadvantaged need for availing equal opportunities.
- ❑ Be alert to the way never-never goals like “social justice” over-extend and eventually undermine the State. Shift the debate from “a large State *vs.* a small State” to a State that performs.
- ❑ Bear in mind that if the majority disregards smaller sections in the community, it drives them to rebellion. Equally, if their leaders stoke the smaller sections into aggressive behaviour, if they wrest concession after concession, if they are welded into blocs for votes, etc., there *will* be a backlash from the majority.

Refashion policies of the State on truly secular and liberal principles:

- ❑ The individual, and not the group should be the unit of State policy.
- ❑ Never concede to one group – for instance, one religion – what you will deny to another group – for instance, another religion.
- ❑ Never concede to a caste or religious group what you will deny to a secular group.

I remember saying all this at the time Bhindranwale was being patronized. I was denounced as a communalist. What transpired exceeded my apprehension.

I remember saying the same thing when concessions were being extracted, and given in the name of secularism at the time of the Shah Bano case. I was denounced as a communalist. The backlash exceeded my apprehension.

I sense the same cycle of pandering begin again. The dénouement will be no different. There will be little point in moaning about the outcome then.

Depth, and courage

Intellect has been driven out of discourse in India.

By intimidation, as we have seen.

By superficiality – debate seldom goes beyond the slogan.

By superciliousness – in the month that Manipur was on fire, the two great questions that gripped Delhi's two largest papers were why liquor vends should not remain open till midnight, and why citizens of Delhi should not have the convenience of shopping round the clock.

By "balanced journalism" – "Murli Manohar Joshi says... Arjun Singh says..." So that, if tomorrow June 25 were to occur again, *The Times of India* would have, as it does on other issues, two editorials – one pro, one con. Though I confess that would be a vast improvement over what it had printed about *that* June 25: led as it was by very progressive intellectuals then, it endorsed the Emergency out and out!

Sad to say, even the judgments of our courts do not give evidence of the deep reflection that we need. They betray little of that reference back to first principles that we need – specially at a time when those principles are being prostituted by the "commentariat" as much as by the political class.

All this leaves us dangerously exposed.

Freedom and growth and justice have many prerequisites, but none more fundamental than free speech – for by that alone can the usurpers' assertions be punctured, by that alone can ruinous policies be rolled back. But for speech to be valued enough by the people so that they would not permit the usurper to stamp it out, so that wrong policies may not survive as long as the license-quota-control *raj* did, speech must be reasoned, it must inform through cogent argument, it must deliver evidence.

Restoring substance to public discourse, thus, is the pre-prerequisite we need.

And the pre-pre-prerequisite for that is the courage – ordinary courage – to stand in the face of intellectual fashions. And a little obstinacy – that we will shun superciliousness, that we will examine each issue in depth. After all, the future of our country depends on the outcome.

It may be that once a poison like casteism enters the body, one just has to wait for it to work its way out of the entire body – that we will just have to wait till a modernizing, increasingly intertwined economy will be so stymied by an inefficient State apparatus and evils like casteism that it will bring sufficient pressure to bear for reform. That may imply that remedying the basic ills that we have encountered above may be beyond our reach. But even if that were indeed the case, there is much we can do to “give history a helping hand.” The fulcrum of reform, that is discourse, is within the grasp of each of us. We can explore alternate constitutional arrangements, alternate ways of helping the disadvantaged. We can inject those alternatives into public discourse. We can puncture the falsehoods by which standards are being diluted, institutions suborned. Each of us can each take up one institution and work to make it run better, to make it more accountable. Each of us can take up one issue, one policy and improve discourse on it.

What the *Dhammapada* counsels for each of us holds equally good for each institution, each matter of State, each facet of society that we want to reform:

*As the silversmith removes impurities from silver,
So the wise man from himself:
One by one, little by little, again and again.*

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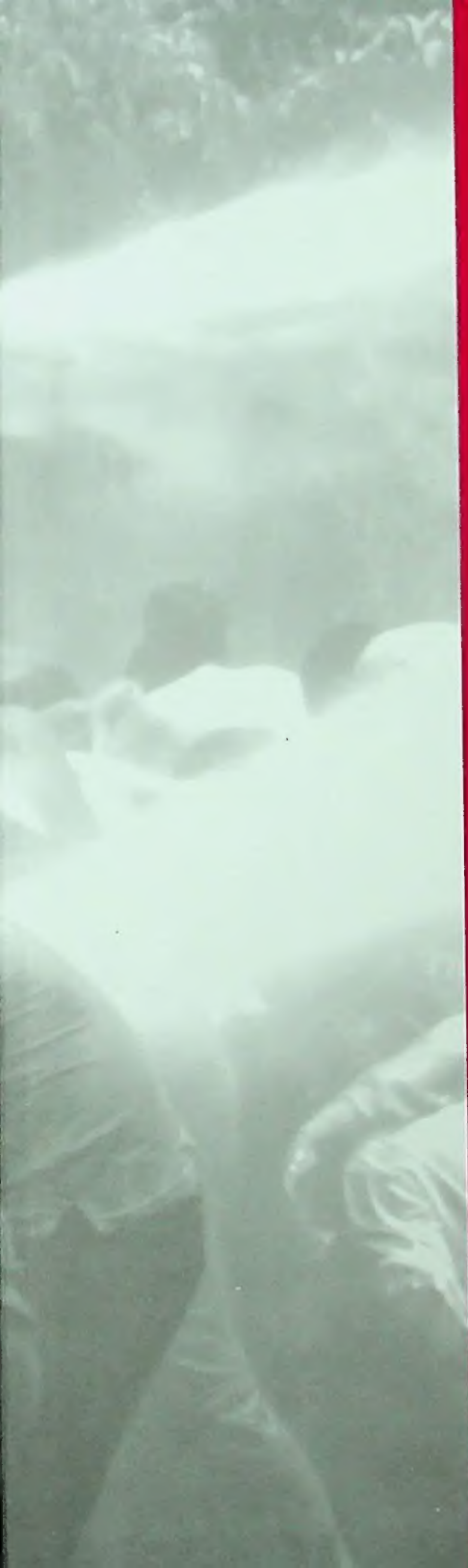
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I have referred above to efficiency and to our getting out of our traditional ruts. This necessitates our getting out of the old habit of reservations and particular privileges being given to this caste or that group.

... I have no doubt that there is a vast reservoir of potential talent in this country if only we can give it opportunity.

But if we go in for reservations on communal and caste basis, we swamp the bright and able people and remain second-rate or third-rate. I am grieved to learn how far this business of reservation has gone based on communal considerations. It has amazed me to learn that even promotions are based sometimes on communal or caste considerations. This way lies not only folly, but disaster. Let us help the backward groups by all means, but never at the cost of efficiency. How are we going to build the public sector or indeed any sector with second-rate people?